Supreme Court, U.S.
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NO_____

IN THE
SUPREME COURT OF THE UNITED STATES

**SHERRI YAX, BRIAN TRAYNOR,
and PATRICK DZAGULONES,
Petitioners**

v

**UPS a/k/a UNITED PARCEL SERVICE
and LIBERTY MUTUAL INSURANCE
COMPANY, foreign corporations,
Respondents**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

MUST A PLAINTIFF IN A CIVIL RICO CASE BROUGHT UNDER 18 U.S.C. §1964(C), WHO ALLEGES MAIL FRAUD IN VIOLATION OF 18 U.S.C. §1341, PLEAD COMMON LAW FRAUD?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

PLAINTIFFS

Sherri Yax, Brian Traynor, and Patrick Dzagulones

DEFENDANTS

UPS (formerly United Parcel Service) and Liberty Mutual Insurance Company

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V

BASIS FOR JURISDICTION

1. The judgement of the Court of Appeals was entered August [illegible] 2006.

2. Jurisdiction to review this writ exists under 28 U.S.C. §2101

THE STATUTES INVOLVED IN THE CASE

Federal: The Racketeer Influenced Corrupt Organization Act (RICO) sections 18 U.S.C. 1961 and 18 U.S.C. 1962(c); 18 U.S.C. §1341 (relating to mail fraud), 18 U.S.C. §1343 (relating to wire fraud)

State: Michigan Workers Disability Compensation Act, MCL 418.101 et seq, sections 301, 315, 631, 801

STATEMENT OF THE CASE

This case presents a major question arising under the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et seq (RICO): whether plaintiffs in a civil suit who claim they are victims of mail fraud must allege common law fraud - ie, that a misrepresentation was made to them upon which they relied to their detriment. The Court of Appeals for the Sixth Circuit so ruled, and granted defendants' Rule 12(b)(6) motions to dismiss for failure to state a claim. Six other Circuits disagree, holding that reliance by the target of the scheme is not required by RICO. Some of the Circuits have ruled, and plaintiffs argue here, *RICO requires only that mail fraud victims allege they are the direct victims of a scheme to defraud which is indictable under 18 U.S.C. §1341.* Still other Circuits have held that a civil RICO mail fraud claim is stated when plaintiffs allege they are the direct victims of a misrepresentation made to a third person, as part of a scheme to defraud indictable under 18 U.S.C. §§1341. If either of these rules rule is adopted by the Court, the decision of the Sixth Circuit must be reversed.

In addition, the decision of the Sixth Circuit is incompatible with *Neder v United States*, 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999), which held that reliance is not required for an act to be indictable under the mail fraud statute.[1]

Two months before the Sixth Circuit dismissed plaintiffs' appeal, this Court decided *Anza et al v Ideal*

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1. Plaintiffs arguments throughout this brief are intended to apply to both the mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343, but for brevity plaintiffs will use only the term "mail fraud."

Steel Supply Corp , 547 US ___ (04-433, June 5, 2006). Defendant in that case requested this Court to hold "that a plaintiff may not assert a RICO claim predicated on mail fraud or wire fraud unless it demonstrates it relied on the defendant's misrepresentations." The Court said that because the plaintiff "has not satisfied the proximate-cause requirement articulated in *Holmes* [*v Security Investors Protection Corp*, 503 US 258, 112 S Ct 1311, 117 L Ed 2d 532 (1992)] , we have no occasion to address the substantial question whether a showing of reliance is required." *Anza*, id, slip opinion 9.

This "substantial question" is squarely presented here, because Mrs. Yax and her co-plaintiffs have satisfied the proximate-cause requirement articulated in *Holmes*, yet the Sixth Circuit dismissed the case because it held plaintiffs did not plead reliance on a misrepresentation by the defendants.

This petition should be granted because "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court" (SC Rule 10(c)), and because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" (SC Rule 10(a)).

Plaintiffs in this case are employees of UPS who claim they were injured on the job, entitling them to workers compensation benefits under Michigan's Workers Disability Compensation Act ("WDCA"), Michigan Compiled Laws 418.101 et. seq., from UPS and its insurer Liberty Mutual ("Liberty"). The benefits consisted of weekly wage loss checks and payment of medical care for their injuries. Plaintiffs alleged a scheme by defendants to fraudulently deprive them of their benefits. This scheme used the mails in two ways:

(1) Liberty, acting in concert with UPS, mailed

fraudulent Notices of Dispute to them and to the Michigan Workers Compensation Agency, which administers the WDCA; the Notice of Dispute is a form which an insurer is required to file with the Agency when it terminates or denies benefits. The Notices of Dispute gave false explanations for the denial or termination of benefits to the plaintiffs.

(2) Liberty, acting in concert with UPS, obtained and mailed false medical reports from doctors. Liberty cited these false reports in Notices of Dispute as the basis for terminating or denying benefits.

Each of these acts involved mail fraud in violation of 18 U.S.C. §1341. Plaintiffs alleged defendants' fraudulent acts directly and immediately injured them because upon the mailing of the Notices of Dispute Liberty cut off or denied their weekly wage loss checks and medical care, and caused them attorney expense to recover those benefits.

Plaintiffs brought suit in the United States District Court for the Eastern District of Michigan, alleging a civil RICO cause of action under 18 U.S.C. §1962(c), which provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise... to conduct or participate... directly in the conduct of such enterprise's affairs through a pattern of racketeering activity...

18 U.S.C. §1851 states:-

> As used in this chapter -
>
> (1) "rac keteering activity" means..... (B) any act which is indictable under any of the following provisions of title 18, United States Code: .... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud).....

Defendants filed a motion to dismiss under Rule

12(b)(6), asserting, inter alia, that plaintiffs failed to plead common law fraud, citing *Bender v Southland Corp,* 749 F2d 1205 (6th Cir 1984). *Bender* held a civil RICO plaintiff must allege he detrimentally relied on a misrepresentation made to him. The District Court, relying on *Bender*, granted the motion, holding, inter alia, that plaintiff failed to plead common law fraud. (Apx 9, 21) The Court of Appeals affirmed, citing *Bender.* (Apx 1)

Basis for Federal Jurisdiction in the District Court

Federal question jurisdiction is conferred on plaintiffs' claims by the Federal Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et seq (RICO). Diversity of citizenship jurisdiction is conferred by 28 U.S.C. §1332 (plaintiffs are citizens of Michigan, defendants are citizens of other states, and the amounts in controversy exceed $75,000).

ARGUMENT

Background and Procedural History

Sherri Yax, Bryan Traynor and Patrick Dzagulones were injured while working for UPS (formerly United Parcel Service). They sought Michigan workers compensation benefits from defendants. Liberty Mutual Insurance Company insured UPS for those benefits and, with the assistance of UPS, adjusted workers compensation claims made against UPS.

Michigan's workers compensation scheme was established by the Worker's Disability Compensation Act ("WDCA"), Michigan Compiled Laws ["MCL"] 418.101 et. seq.. Section 301(1) of the WDCA provides that an "employee who receives a personal injury arising out of the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." (Apx 60) Section 315 provides that the "employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical...and medicines... when they are needed." (Apx 60)

Section 801 of the WDCA provides for sanctions against an employer and its insurer if benefits are not paid promptly to the injured employee. However, an insurer may avoid sanctions by filing a Notice of Dispute with the Workers Compensation Agency (the "Agency"):

> Sec. 801 (1) Compensation shall be paid promptly and directly to the person entitled thereto and shall become due and payable on the fourteenth day after the employer has notice or knowledge of the disability or death, on which date all compensation then accrued shall be paid.

> (2) If weekly compensation benefits or accrued weekly benefits are not paid within 30 days after becoming due and payable, in cases where there is not an ongoing dispute, $50 per day shall be added and paid to the worker for each day over 30 days in which the benefits are not paid. [MCL 418.801]

A claims adjuster seeking to deny or terminate an employee's benefits must file a Notice of Dispute with the Agency (formerly the Bureau of Workers Disability Compensation) and send a copy to the employee. The manner and method of disputing a claim via a Notice of Dispute is set out in Administrative Rule R408.33:

> Rule 3 (1) On or before the fourteenth day after the employer has notice or knowledge of an alleged injury or death, a carrier... shall notify the bureau, on form 107, if the right of the injured employee or dependant to compensation is disputed.... A copy of form 107, notice of dispute, shall be mailed or given to the injured employee.

A Notice of Dispute form is in the Appendix at 52.

Sherri Yax, Bryan Traynor, Patrick Dzagulones and three other UPS employees who have since dismissed their claims brought suit on May 29, 2003, pursuant to §1964(c) of the federal Racketeer Influence and Corrupt Organization Act ("RICO"), 18 U.S.C. §1961, et. seq.. RICO Section 1964(c) provides in part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee... (Apx 53)

Plaintiffs alleged UPS and Liberty Mutual fraudulently deprived them of their workers compensation

benefits through a "pattern of racketeering activity" in violation of §1962(c), which provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise' s affairs through a pattern of racketeering activity or collection of unlawful debt. (Apx 53)

Yax and the other plaintiffs alleged UPS and Liberty Mutual committed a series of "predicate acts" of "racketeering activity" involving mail and wire fraud in violation of 18 U.S.C. §1961(1) of the RICO statute. §1961(1) defines "racketeering activity" to include "any act which is indictable" under the mail and wire fraud provisions of title 18 of the United States Code, §§1341 and 1343.

Plaintiffs filed a First Amended Complaint (Apx 42), which alleged in part that UPS and Liberty "formed an "enterprise" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO)". This enterprise schemed to defraud them of their workers compensation benefits. Plaintiffs alleged defendants:

> 7. ...committed... mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently terminating or denying benefits, or by fraudulently terminating benefits because a person refused to settle a claim for the amount offered by Liberty Mutual. This fraud was accomplished by use of the United States mails and by electronic communications in violation of 18 U.S.C. 1341 and 1343...

Each plaintiff alleged the particulars of his or her causes of action. Sherri Yax's allegations are representative:

9. In late 2001 and in 2002, Liberty Mutual received reports from not one but three physicians, Drs. David Carr, Phillip Friedman and Dale Hoekstra, each saying that plaintiff remained disabled from her job because of lumbosacral symptoms and pathology. These reports indicated that plaintiff's disabling symptoms and or pathology were caused or at least partly caused (aggravated) by work Because plaintiff's disability was partly caused by work, it was fully compensable under the Michigan Workers Disability Compensation Act, MCL 418.101 et seq.

***

12. On September 17, 2002, Liberty Mutual filed a Notice of Dispute with the Michigan Bureau of Workers Disability Compensation, stating" No medical evidence for continued disability." Pursuant to this Notice of Dispute, Liberty ceased paying workers compensation benefits.

13. At the time Liberty filed the notice of dispute, it possessed multiple medical reports stating plaintiff continued to be disabled. These reports were also in the possession of the workers compensation claims officials at UPS...

***

16. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of UPS who are entitled to Michigan workers compensation benefits..

***

18. Defendants' violation of RICO caused plaintiff to be wrongfully deprived of

Michigan workers compensation benefits.

Each plaintiff alleged defendants' scheme caused them attorney expenses to recover their benefits, as well as loss of the benefits.

Defendants filed Motions to Dismiss under civil procedure Rule 12(b)(6), failure to state a claim upon which relief can be granted. The district court on March 31, 2004 issued an order which (1) dismissed all counts against Liberty Mutual under the McCarran-Ferguson Act, 15 U.S.C. §1012(b); (2) held each plaintiff failed to plead an actionable RICO claim against UPS; and (3) granted plaintiffs leave to amend their claims against UPS to meet the RICO pleading defects found by the court. (Mar. 31, 2004 Memorandum Opinion at 25-26, Apx pg 21)

The court also said that in a RICO claim alleging mail or wire fraud, plaintiffs

> "...cannot maintain a civil RICO claim against these defendants absent evidence that the Defendants made misrepresentations or omissions of material fact to the Plaintiffs and evidence that Plaintiffs relied on these misrepresentations or omissions to its [sic] detriment. See *Bender v Southland Corp,* 749 F2d 1205, 1216 (6th Cir 1984)..." *Id,* at 12.

The court added,

> "Since Plaintiffs' Complaint not only does not demonstrate reliance, but does not indicate that any of the alleged fraudulent communications were communicated directly or indirectly to the Plaintiffs, Plaintiffs' RICO cause of action must fail absent amendment of the Complaint." (*Id.* at 18, 19).

In response to the court's grant of leave to amend, plaintiffs filed their Second Amended Complaint against both UPS and Liberty Mutual (Apx 26). The Second Amended Complaint alleged Liberty mailed Notices of Dispute directly to the plaintiffs, pursuant to Michigan

Administrative Rule 408.33, which requires the insurer to mail a copy to the injured worker when the original is filed with the Agency (Apx 60). However, the amended complaint did not show that plaintiffs relied on the Notices of Dispute to their detriment, except insofar as they had to hire a lawyer to sue for their benefits.

Each of the plaintiffs did allege that defendants' fraud proximately injured him or her. For example, Patrick Dzagulones alleged in the Second Amended Complaint:

> 30. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees... (Apx 26)

Similar allegations were made by Yax and Traynor.

Defendants renewed their Rule 12(b)(6) motions to dismiss for failure to state a claim, asserting plaintiffs failed to allege common law fraud. The District Court agreed and granted the motions, citing *Bender*, supra, among other grounds (Apx 9). The court held that plaintiffs' allegation that they relied on defendants' misrepresentations, in that they suffered the expense of hiring a lawyer to regain their benefits, was not an allegation of detrimental reliance. The Sixth Circuit affirmed (Apx 1).

I.

A CIVIL RICO PLAINTIFF WHO ALLEGES VIOLATION OF THE MAIL FRAUD STATUTE SHOULD NOT BE REQUIRED TO ALLEGE HE RELIED ON DEFENDANTS' MAILED MISREPRESENTATION MADE TO HIM, WHERE HE ALLEGES DEFENDANTS' FRAUDULENT SCHEME DIRECTLY INJURED HIM, AND THE MAILS WERE USED IN THE FURTHERANCE OF THE SCHEME.

The Racketeer Influenced Corrupt Organization Act (RICO) provides at 18 U.S.C. §1962(c), Prohibited Activities:

> (c) It shall be unlawful for any person employed by or associated with any enterprise... to conduct... such enterprise' s affairs through a pattern of racketeering activity... (Apx 53)

§1961(1) defines "racketeering activity" to include "any act which is indictable" under the mail fraud statute of title 18 of the United States Code, §1341. Mail fraud is, in the parlance of RICO litigation, a predicate act. A plaintiff is required by §1962(c) to allege a sufficient number of predicate acts of racketeering to form a "pattern of racketeering activity." (Apx 53)

Sherri Yax, Brian Traynor and Patrick Dzagulones alleged UPS and Liberty Mutual committed mail fraud in a pattern of racketeering activity, fraudulently depriving them of their workers compensation benefits. They sought a civil remedy under 18 U.S.C. §1964.

Plaintiffs argue their pleadings sufficiently alleged mail fraud because they showed Liberty's and UPS's fraudulent scheme directly deprived them of workers' compensation benefits, and defendants used the mails in

furtherance of that scheme. *Plaintiffs need not show the mailings misrepresented anything; innocent mailings in furtherance of a scheme to defraud should be sufficient in a civil RICO action based on the mail fraud statute.*

Alternatively, plaintiffs argue their pleadings alleged mail fraud because they alleged defendants did mail misrepresentations, to a third person (the Workers Compensation Agency), which proximately injured them. The misrepresentations need not have been made directly to the plaintiffs, and the plaintiffs need not have relied on them, as long as the misrepresentations proximately damaged the plaintiffs.

The Sixth Circuit rejected plaintiffs' claims because in 1984 it held the plaintiffs cannot maintain a civil RICO action absent allegations of common law fraud. The plaintiffs must allege defendants made misrepresentations or omissions of material facts to them, and they relied on those misrepresentations or omissions to their detriment, *Bender v Southland Corp*, 749 F2d 1205, 1216 (6th Cir 1984). Plaintiffs asked the Sixth Circuit to overturn *Bender*, but the court answered:

> This, we are forbidden to do. In the Sixth Circuit, as well as all other federal circuits, one panel cannot overrule a prior panel's published decision. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.

Plaintiffs now ask this court to overrule the Sixth Circuit rule requiring them to allege common law fraud, because *Bender* conflicts with -

A. the express language of RICO;

B. the remedial purpose of RICO;

C. this Court's statement in *Holmes*, supra, at footnote 19, that a RICO civil suit may be maintained despite the absence of common law fraud where plaintiffs can prove proximate cause;

and
D. decisions of other courts of appeal.

A.

THE RICO STATUTE REQUIRES A PLAINTIFF TO ALLEGE AN ACT "I NDICTABLE" UNDER THE MAIL FRAUD STATUTE, NOT COMMON LAW FRAUD

The RICO statute does not contain a requirement that plaintiff allege common law fraud.

§1961(1) defines "racketeering activity" to include an act "indictable" under18 U.S.C. §1341. This Court has held that common law fraud is not required for an act to be indictable in a RICO prosecution alleging violation of the mail fraud statute. Reliance on a misrepresentation is not required, *Neder v US*, 527 US 1, 119 S Ct 1872, 144 L Ed 2d 35 (1999).

Nothing in the RICO statute places a higher burden on plaintiff in a civil suit than is placed upon the government in a prosecution. *Neder*, supra, said

> The common law requirements of "justifiable reliance" and "damages," for example, plainly have no place in the federal fraud statutes. See, eg, United States v Stewart, 872 F. 2d 957, 960 (CA 10 1989) ("[Under the mail fraud statute,] the government does not have to prove actual reliance upon the defendant's misrepresentations"); United States v Rowe, 56 F. 2d 747, 749 (CA 2 1932) (L. Hand, J) ("Civilly of course the [mail fraud statute] without proof of damage, but that has no application to criminal liability"), cert denied, 286 US 554, 52 S Ct 579, 76 L Ed 1289 (1932). *Neder*, supra, 527 US at 24.

The text of the RICO statute is instructive on the issue of whether reliance or a mailed false statement are requirements of a civil action. Section 18 U.S.C. §1851 states

> "racketeering activity" means..... (B) *any act which is indictable* under any of the following provisions of title 18, United States Code: .... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud).....

Congress did not say that a plaintiff in a civil suit must allege more than the government is required to allege in a prosecution. Congress said a plaintiff must allege an "act which is indictable." Because the government in a mail fraud prosecution is not required to allege reliance, *Neder*, supra, or even a mailed misrepresentation, *Schmuck v United States*, 489 US 705, 109 S Ct 1443, 103 L Ed 2d 734 (1989), rehearing denied, 490 US 1076 (2001), neither are Mrs. Yax nor her co-plaintiffs in their civil suit.

Bender, supra, demands plaintiff allege more than RICO requires. *Bender* conflicts with the express language of the statute and should be reversed.

B.
CONGRESS' COMMAND THAT THE RICO STATUTE SHALL BE "LIBERA LLY CONSTRUED TO EFFECTUATE ITS REMEDIAL PURPOSE" IS AN IMPORTANT REASON TO REJECT *BENDER'S* REQUIREMENT THAT A PLAINTIFF TO ALLEGE COMMON LAW FRAUD

Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes," §904(a) of Pub. L. No 91-452, 84 Stat. 947, 18 U.S.C. §note. "Indeed,

if Congress' liberal-construction mandate is to be applied anywhere, it is in §1964, where RICO's remedial purposes are most evident." *Sedima, S.P.R.L. v Imrex Co, Inc.*, 473 US 479 at 491 n. 10; 105 S Ct 3275 at 3283 n. 10; 87 L Ed 2d 346 at 356 n. 10. "The statute's remedial purposes are nowhere more in evidence than in the provision of a private action for those injured by racketeering activity." *Sedima*, supra, 473 US at 498, 105 S Ct at 3286, 87 L Ed 2d at 360. *Bender's* restriction of private actions conflicts with *Sedima's* encouragement of private actions.

The statute was intended to reach not only mobsters, the Court said in *Sedima*, but also legitimate businesses which scheme dishonestly. "Indeed, the Supreme Court has consistently struck down efforts by the courts of appeals to narrow RICO's scope." *Tabas v Tabas*, 47 F3d 1280, 1297 (3rd Cir 1995).

C.

THIS COURT INDICATED IN FOOTNOTE 19 OF *HOLMES*, SUPRA, THAT RELIANCE BY A PLAINTIFF ON A MISREPRESENTATION MADE TO HIM WAS NOT REQUIRED IF HE PROVED HE WAS PROXIMATELY INJURED BY DEFENDANT'S FRAUD

Proximate cause is the key. *Holmes* required direct injury before a person could bring a RICO claim, and indicated that once the direct injury requirement was satisfied, the victim of a fraudulent scheme should be able to allege violation of the mail and wire fraud statutes. The Court indicated in footnote 19 that reliance by plaintiffs on a misrepresentation made to them was not a civil RICO requirement. Mrs. Yax and her co-plaintiffs plausibly alleged they were the direct victims of defendants' fraudulent scheme, and their claims should not have been dismissed.

In *Holmes*, the Securities Investor Protection

Corporation (SIPC), and trustees appointed to liquidate the securities of a bankrupt broker which was an SIPC member, First State Securities Corporation (FSSC), brought suit against Robert Holmes Jr, claiming he participated in a fraudulent scheme leading to the demise of FSSC, which caused SIPC to advance $13 million to cover the claims of FSSC's customers. The suit claimed Holmes violated the mail and wire fraud statutes, and that the acts of Holmes and his co-conspirators amounted to a pattern of racketeering under RICO. The district court dismissed the claims of the SIPC and the trustees on the ground, inter alia, that plaintiff had not satisified the proximate cause requirement under RICO. The United States Court of Appeals for the Ninth Circuit reversed and remanded. This court granted Holmes' petition on the issue " whether SIPC had a right to sue under RICO."

This court noted that a RICO plaintiff must show that defendant's violation was a proximate cause of his injury. The court fleshed out this term of legal art:

> Here we use "proxima te cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Low of Torts, §41, P. 264 (5th ed. 1984). Accordingly, among the many shapes this concept took at common law, see *Associated General Contractors [of Cal., Inc. V Carpenters,* 459 US 519, 529 (1983)], supra, at 532-533, was a demand for some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a

distance to recover.

Holmes applied this concept to deny SIPC and the trustees the right to sue under RICO, holding that "the link is too remote" between the actions of the alleged conspirators and the harm suffered by the customers of the defunct brokerage, FSSC. The acts of defendants did not result in a "direct injury" to the customers. These customers, in whose shoes SIPC stood, were "s econdary victims" of the conspiracy, and their damages were at best very difficult to assess because of their remoteness in the chain of causation between the conspiracy and their loss.

Of critical importance to this case is footnote 19 of *Holmes,* which indicates that a scheme such as Mrs. Yax and her co-plaintiffs allege may meet both the proximate cause and pleading requirements of RICO, even though common law fraud is not alleged .

> We further note that SIPC alleged in the courts below that, in late May 1981, Joseph Lugo, an officer of FSSC and one of the alleged conspirators, parked manipulated stock in the accounts of customers, among them Holmes, who actively participated in the parking transaction involving his account. See Statement of Background and Facts, 1 App. 223-225. Lugo "sold" securities owned by FSSC to customers at market price, and "bought" back the same securities some days later at the same price plus interest. Under applicable regulations, a broker dealer must discount the stock it holds in its own account, see 17 CFR § 240.15c3-1(c)(2)(iv)(F)(1)(vi) (1991), and the sham transactions allowed FSSC to avoid the discount. But for the parking transactions, FSSC would allegedly have failed capital requirements sooner; would have been shut down by regulators; and would not have dragged Sebag with it in its demise. 1 App. 231. Thus, their customers would have been

> injured to a lesser extent. *Id.*, at 229, 231. We do not rule out that, if, by engaging in the parking transactions, the conspirators committed mail fraud, wire fraud, or "fraud in the sale of securities," see 18 U.S.C. §§ 1961(1)(B) and (D) (1988 ed., Supp. I), the broker dealers' customers might be proximately injured by these offenses. See, *e. g., Taffet* v. *Southern Co.*, 930 F. 2d 847, 856-857 (CA11 1991); *County of Suffolk* v. *Long Island Lighting Co.*, 907 F. 2d 1295, 1311-1312 (CA2 1990). However this may be, SIPC in its brief on the merits places exclusive reliance on a manipulation theory, and is completely silent about the alleged parking scheme.

The cited pages of *County of Suffolk* and *Taffet* approved RICO mail fraud complaints which did not allege common law fraud. In those cases, utility customers alleged utility officers made fraudulent representations in rate proceedings before state commissions, thereby causing unwarranted rate increases. The courts of appeal held the customers alleged proximate cause, even though no misrepresentations were made to them by defendants.

Bender, which restricts RICO mail fraud claims to common law fraud, conflicts with *Holmes'* approval of *County of Suffolk* and *Taffet*. Plaintiffs who plead an injury proximately caused by defendants' fraudulent scheme, *Holmes* indicates, plead a civil RICO cause of action even if they have not relied on a misrepresentation made to them.

D.

THE RULING OF THE SIXTH CIRCUIT CONFLICTS WITH THE DECISIONS OF SIX OTHER CIRCUITS

1. The Rule of the Third, Eighth, and Ninth Circuits

Several courts of appeal have held that a civil RICO suit alleging mail fraud does not require plaintiff to allege defendant committed an act of common law fraud, but that he allege only that defendant committed an act indictable under 18 U.S.C. §1341 which proximately injured him. Noting the broad reach of RICO, at least three circuits have held that a scheme may constitute civil RICO mail fraud it even if it does not involve *any* mailed misrepresentation, as long as plaintiff can show defendants' dishonest scheme proximately caused him loss, and the mails were used in furtherance of the scheme:

- *Abels v Farmers Commodities Corp,* 259 F 3d 910, 918 (8th Cir 2001): "A plaintiff may, but need not, allege that a defendant made misrepresentations of fact. [citation] Because misrepresentations of fact are not necessary to the offense, it follows that no misrepresentations need by transmitted by mail or wire; even routine business communications in these media may suffice to make a scheme of false dealing into a federal offense." *Id*, 918.
- *Schreiber Distributing v Serv-Well Furniture Co*, 806 F2d 1393, 1400 (9th Cir 1986): Plaintiffs must show "(1) The defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the US mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud... This is consistent with the purpose of the statutes, which is to proscribe the use of the mails or wires in any situation where it is closely entwined with fraudulent activity."
- In *Tabas v Tabas,* 47 F3d 1280, 1294 (3rd Cir 1995), defendants were executors of an estate. The Third Circuit held that each time defendants made a questionable charge or received compensation to which they were not entitled, they committed acts of

—mail fraud. Citing *Schmuck v United States,* 489 US 705, 715, 109 S Ct5 1443, 1450, 103 L Ed 2d 734 (1989), the court held that completely innocent mailings in furtherance of this fraud can supply the mailing element in a RICO claim based on 18 U.S.C. §1341.

This Court should adopt the rule of these courts and hold that a mailed misrepresentation is not a required element of a civil RICO mail fraud claim. A plaintiff's pleadings should suffice where he alleges or shows a fraudulent scheme proximately caused him damage, and the mails were used in furtherance of the scheme. *Sedima's* injunction that RICO's civil action provision be liberally construed ordains such pleadings, and such pleadings satisfy *Holmes'* requirement that defendants' acts proximately harmed the plaintiff.

Mrs. Yax's and her co-plaintiffs' pleadings meet the requirements of the rule enunciated by the Eighth, Ninth, and Third Circuits, because they alleged Liberty and UPS cut off their benefits under false pretenses (claiming they had no proof of disability when they did, or obtaining false medical reports which said a plaintiff was not disabled when he was); (2) defendants mailed the Notices of Dispute and the medical reports in furtherance of the scheme; and (3) defendants' scheme directly deprived them of their workers compensation benefits and caused them attorney fee expense.

Plaintiffs' pleadings also satisfied this Court's concern, expressed in *Holmes,* supra, that a civil plaintiff plausibly allege he was directly damaged by defendant's fraud. Plaintiffs alleged they were the direct target of defendants's scheme, and that defendants directly injured them by cutting off or denying their benefits and causing them the expense of hiring an attorney to recover their benefits. Plaintiffs alleged proximate cause.

2. The Rule of the First, Fourth, and Fifth Circuits

Other circuits have required a plaintiff claiming

mail fraud to allege or show a mailed misrepresentation, but have held a mailed misrepresentation to a third person was sufficient. The Fifth Circuit held a plaintiff sufficiently alleged RICO mail fraud where the false statements were directed not to him but to customers in the marketplace in which he competed, which the customers relied on to the damage of plaintiff. *Procter & Gamble Company v Amway Corp,* 242 F3d 539, 546-5 (5th Cir 2001). Plaintiff alleged Amway Corporation lured away its customers by spreading false rumors that it was linked to Satanism. The court held this pleading sufficient:

> ....a target of a fraud that did not itself rely on the fraud may pursue a RICO claim if the other elements of proximate causation are present. *Procter & Gamble,* supra, 565.

The First Circuit, in *Systems Management, Inc, v Loiselle,* 303 F 3d 100, 104 (1st Cir 2002) also held that false statements to a third person could constitute mail fraud, where they proximately damaged plaintiff. Plaintiffs, janitorial workers, alleged that Loiselle, owner of a janitorial service company, paid his workers less than the required prevailing wage to clean college offices, but falsely represented to the college that he paid the required wage. Plaintiffs filed a civil RICO case claiming they lost employment due to defendant's mail fraud. Loiselle asserted he was entitled to dismissal because plaintiffs had not pled reliance on the misrepresentations. The court rejected the argument:

> It is true that at common law, a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception, and some courts have imported this requirement into RICO actions where the predicate acts comprise mail or wire fraud. But RICO bases its own brand of civil liability simply on the commission of specified criminal acts - here, criminal fraud - so long as they comprise a "pattern of racketeering activity"; and criminal fraud

> under the federal statute does not require 'r eliance' by anyone; it is enough that the defendant sought to deceive, whether or not he succeeded. See *Neder v United States*, 527 US 1, 119 S Ct 1872, 144 L Ed 2d 35 (1999). (" The common-law requirement[] of 'justifiable reliance' has no place in the federal fraud statutes.")
>
> ...Congress structured its civil remedy to allow recovery for harm caused by defined criminal acts, including violation of section 1341; and, as noted, the federal mail fraud statute does not require reliance. Thus, under a literal reading of RICO--the presumptive choice in interpretation--nothing more than the criminal violation and resulting harm is required.
>
> ***
>
> ...There is no good reason her to depart from RICO's literal language by importing a reliance requirement into RICO. *Id*, 303 F3d 104

See also *Mid Atlantic Telecom, Inc v Long Distance Services, Inc*, 18 F 3d 260, 263 (4th Cir 1994).

The pleadings of Mrs. Yax and her co-plaintiffs are sufficient under *Procter & Gamble*, *Summit*, *Atlantic Telecom* and *Systems Management*. They alleged or showed they were proximately injured by defendants' fraud, even though the misrepresentations were made to the Workers Compensation Agency and not to them.

The false statements contained in the Notices of Dispute issued by Liberty Mutual were directed to officials of the Michigan Workers Compensation Agency. Defendants conceded they mailed the Notices of Dispute to the Agency, and sent copies to plaintiff. (Trial court Opinion, May 27, 2005, at Apx 9) The statements misled the Agency as to the basis for defendants' cut-off of benefits. Liberty falsely and repeatedly represented to the Agency that there was a proper basis for the denial of

plaintiffs' benefits.

The false statements proximately injured plaintiffs. Because the Notices of Dispute did not tell the Agency the true and improper reasons for the cut-offs of benefits, the Agency took no action against Liberty, and Liberty was able to continue wrongfully withholding benefits[2]. Under *Procter & Gamble, Mid Atlantic Telecom* and *Systems Management*, Liberty's false statements to the Agency fulfill the misrepresentation requirement in a RICO claim of mail fraud.

However, the decisions of the Fourth, Fifth and First Circuits are not compatible with this Court's rulings insofar as they *require* reliance on a misrepresentation by a third person. Reliance on a misrepresentation is not a requirement of the mail fraud statute. *Neder*, supra, said so. "The common law requirements of "justifiable reliance" and "damages," for example, plainly have no place in the federal fraud statutes." *Neder*, supra, 527 US at 24.

This Court should rule that a civil RICO plaintiff has

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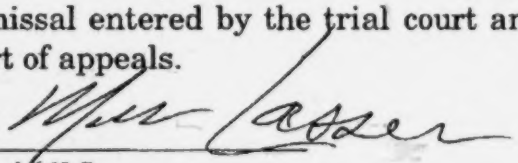
2 Plaintiffs claim that had the Notices of Dispute told the truth - for example, "Liberty Mutual is stopping Sherri Yax's benefits on the ground it has no proof of disability although it does have proof of disability" - the Agency would have taken action under §631(1) of the WDCA, MCL 418.631(1), which provides for revoking an insurer's Michigan license "if any insurer licensed to transact the business of workmen's compensation insurance within this state.... unreasonably fails to pay promptly claims for compensation for which it shall become liable." (Apx XXX) The Agency could also have taken action against Liberty under the penalty provision of §801 of the WDCA, MCL 418.801. (Apx XXX) Note also that the Notice of Dispute warns at the bottom of the form that "[m]aking a false or fraudulent statement for the purpose of... *denying benefits* can result in criminal or civil prosecution, or both..." and cites WDCA sections 801 and 631, as well as rule R408.33. (Apx XXX)

sufficiently plead a cause of action where he has alleged or showed defendants' fraudulent scheme directly caused him loss, and defendants used the mails or wires in furtherance of the scheme. Such a rule complies with the holdings of this court in *Neder*, *Schmuck*, *Sedima*, and *Holmes*, supra.

RELIEF REQUESTED

Sherri Yax, Bryan Traynor and Patrick Dzagulones request this court to hold their Second Amended Complaint alleged civil RICO causes of action for mail and wire fraud against Liberty Mutual and UPS, and to reverse the dismissal entered by the trial court and affirmed by the court of appeals.



Marshall Lasser
Attorney for petitioners

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Supreme Court, U.S.
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NO_____

IN THE
SUPREME COURT OF THE UNITED STATES

SHERRI YAX, BRYAN TRAYNOR, and PATRICK DZAGULONES,
Petitioners

v

UPS a/k/a UNITED PARCEL SERVICE and LIBERTY MUTUAL INSURANCE COMPANY, foreign corporations,
Respondents

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT RECOMMENDED FOR PUBLICATION
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHERRI YAX, BRIAN TRAYNOR,)
and PATRICK DZAGULONES,)
)
Plaintiffs-Appellants,)
)
v.)
)
UPS a/k/a UNITED PARCEL)
SERVICE and LIBERTY)
MUTUAL INSURANCE CO.,)
)
Defendants-Appellees.)

Before: SILER, McKEAGUE, and GRIFFIN, Circuit Judges

SILER, Circuit Judge. Former UPS employees Sherri Yax, Brian Traynor, and Patrick Dzagulones ("Pl aintiffs") file suit against UPS and Liberty Mutual ("Defendants") claiming violations of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO"), and the Michigan Worker's Disability Compensation Act of 1969, M.C.L. § 418.101, *et seq.* ("WDCA"). Ultimately, the district court dismissed all of Plaintiffs' allegations for failure to state a claim under Fed. R. Civ. P.12(b)(6). For the following reasons, we affirm the judgment, except for the state-law claims that we remand for the entry of an order of dismissal without prejudice.

BACKGROUND

Plaintiffs are former employees of UPS who claimed to have been injured during the course of their employment with UPS. After the alleged injury, each Plaintiff applied for and was awarded workers' compensation benefits. Beginning in September 2002, Liberty Mutual, UPS's workers' compensation insurance provider, filed a " Notice of Dispute" in each case with the Michigan Bureau of Workers' Disability Compensation ("Bureau") contesting the award of benefits to each Plaintiff on the ground that there was no continuing disability. All Plaintiffs ceased receiving workers' compensation benefits in 2002 or 2003.

In 2003, Plaintiffs sued Defendants in the Eastern District of Michigan alleging (1) Defendants fraudulently deprived them of their workers' compensation benefits through a pattern of racketeering activity, specifically mail and wire fraud, in violation of RICO, (2) wrongfully terminated benefits, and (3) retaliated for filing workers' compensation claims in violation of M.C.L. § 418.301(11). The district court dismissed all of Plaintiffs' claims pursuant to Rule 12(b)(6), except for Plaintiffs' RICO claims against UPS. With respect to the RICO claim against UPS, the district court found that Plaintiffs had failed to state a claim in their amended complaint on that action, but is granted "Plaintiffs' Motion to amend as to their RICO claim against Defendant UPS only" and allowed that claim to proceed. Plaintiffs filed a second amended complaint reasserting their prior RICO claims against both UPS and Liberty Mutual and also asserting for the first time an intentional infliction of emotional distress (" IIED") claim against the Defendants. The district court dismissed with prejudice Plaintiffs' entire complaint pursuant to Rule 12(b)(6). Plaintiffs appeal only the district court's dismissals of their RICO and IIED claims.

STANDARD OF REVIEW

A district court's decision on a motion to dismiss under Rule 12(b)(6) is generally reviewed *de novo by an appellate court. Simon v. Pfizer Inc.*,398 F.3d 765, 772 (6th Circ. 2005).

ANALYSIS

A. RICO Claim

RICO provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). Plaintiffs alleged that Defendants violated § 1961 (c) by "frau dulently depriv[ing] them of their workers[']compensation benefits through a series of predicate acts of racketeering activity involving mail and wire fraud."

The district court dismissed Plaintiffs' RICO claim against Liberty Mutual as reverse-preempted under the McCarran-Ferguson Act. As for the RICO claim against UPS, the district court held that: (1) Plaintiffs failed to plead any false statements or misrepresentations by UPS with particularity; and (2) Plaintiffs failed to present any

evidence that they detrimentally relied upon UPS's alleged misrepresentations.

Looking first to the issue of detrimental reliance, when mail and wire fraud are the predicate acts of a RICO claim, a plaintiff "cannot maintain a civil RICO claim...absent evidence that the defendants made misrepresentations or omissions of material facts to [the plaintiff] and evidence that [the plaintiff] relied on those misrepresentations or omissions to its detriment." *Cent. Distribs. Of Beer, Inc. V. Conn,* 5 F.3d 181, 184 (6 th Cir. 1993) (citing *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). Plaintiffs concede that "[t]his court has repeatedly held that a civil RICO plaintiff who alleges defendants committed a predicate act violating 18 U.S.C. §§ 1341 or 1343 must allege a claim for common law fraud – that is, he detrimentally relied on a deception defendants made to him." Nevertheless, Plaintiffs make a variety of arguments for overturning this precedent and requiring a plaintiff to show only a misrepresentation to a third party that proximately injured the plaintiff.

Most of Plaintiffs' arguments invite this panel to revisit the reliance requirement enunciated in *Bender* and reaffirmed repeatedly since that time.

> This, we are forbidden to do. In the Sixth Circuit, as well as all other federal circuits, one panel cannot overrule a prior panel's published decision. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.

United Sates v Washington, 127 F.3d 510, 517 (6th Cir. 1997) (citations and internal quotations omitted). To the extent Plaintiffs argue that the Supreme Court decisions in *Neder v. United States*, 527 U.S. 1 (q999), and *Sedima, S.P.R.L. V. Imrex Co.*, 473 U.S. 479 (1985), affect the rule set out in *Bender*, that argument has been explicitly rejected in an unpublished decision of this court, *see Chaz Constr., LLC v. Codell*, 137 Fed. App'x. 735, 739 (6th Cir. 2005), and implicitly rejected in a published decision, *see VanDenBroeck v CommonPoint Mortgage Co.*, 210 F .3d 696, 701 (6th Cir. 2000) (reaffirming the requirement that plaintiffs must show reliance after both Sedima and Neder were decided).

Alternatively, Plaintiffs argue that, even should *Bender* remain the law of the circuit, their complaint sufficiently pled reliance and therefore the district court's dismissal of their complaint was in error. However, the only showing of reliance that the Plaintiffs point to in their brief is the following statement:[1]

> Defendants' fraud directly caused injury to Sherri Yax because it deprived her of workers compensation benefits and because it caused her the expense of paying attorney fees and her own milage to and from medical care. Plaintiff relied on the communication to the extent she suffered the financial loss of having to pay attorney fees and medical milage.

This showing is not enough because " the plaintiffs'

---

1 Similar statements were contained in the second amended complaint with respect to Plaintiffs Traynor and Dzagulones.

complaint does not allege what misrepresentations (or omissions) of material fact [UPS] made to the plaintiffs that they reasonably relied upon to their detriment." *Bender*, 749 F.2d at 1216 (citation omitted). Accepting everything Plaintiffs state as true, they did not detrimentally rely upon any statements contained within the notices of dispute filed on UPS' s behalf by Liberty Mutual. What Plaintiffs characterize as reliance upon the statements contained in the notices [payment of various expenses and deprivation of benefits] are, in reality, nothing more than consequences flowing from Defendants' decision to contest Plaintiffs' workers' compensation benefits in each case.

Because of Plaintiffs failure to plead a necessary element of their RICO claim against UPS, we need not reach the district court's alternative ground of dismissal – that Plaintiffs had not pled false statements with particularity. Moreover, we likewise need not reach the McCarran-Ferguson Act issue regarding Liberty Mutual. Since Plaintiffs' RICO claim against Liberty Mutual was based upon the same factual scenario as the RICO claim against UPS, their failure to plead detrimental reliance in their claim against UPS dooms their RICO claim against Liberty Mutual as well.

B. IIED Claim

Plaintiffs also appeal the district court's dismissal of their IIED claims against UPS. The district court dismissed these claims pursuant to Fed. R. Civ.P.12 on the ground that Plaintiffs were not entitled to leave to amend their complaint to allege IIED. Alternatively, the district court held that Plaintiffs' IIED claims failed as a matter of law since "[n]othing described by the Plaintiffs rises to the level of sufficiently outrageous conduct."

We need not decide whether the district court abused its discretion in refusing to allow Plaintiffs leave to amend their complaint or whether the district court's conclusion that Plaintiffs' IIED claim failed as a matter of law was correct. Instead, we need only look to the issue of supplemental jurisdiction over Plaintiffs' state law IIED claim. A federal court that has dismissed a plaintiff's federal law claims should not ordinarily reach the plaintiff's state law claims. *See* 28 U.S.C. § 1367(c)(3); *United Mine Workers of Am. V. Gibbs*, 383 U.S. 715, 726 (q966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.") Supplemental jurisdiction should be exercised only in cases where the "interest of judicial economy and the avoidance of multiplicity of litigation" outweigh our concern over "needlessly deciding state law issues." *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1983) (citation omitted). We review a district court's decision to exercise supplemental jurisdiction for abuse of discretion. *Id.*

Assuming that the district court's alternative holding on the IIED claims constituted an exercise of supplemental jurisdiction, the district court should have dismissed the IIED claims *without* prejudice. Plaintiffs' IIED claims have no bearing on their RICO claims. Moreover, the district court pointed to no overwhelming issues of judicial economy justifying the exercise of supplemental jurisdiction. On the whole, this appears to be the ordinary case in which a federal court would be "needlessly deciding state law issues." *Id.* We will remand the IIED claims for dismissal without prejudice.

The judgment is AFFIRMED as to all claims, except the IIED claims. We REVERSE the dismissal with prejudice of the IIED claims and REMAND for the district court to dismiss the IIED claims without prejudice.

DATED: AUG 24 2006

UNITED STATES DISTRICT COURT
EASTER DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERRI YAX, BRYAN TRAYNOR,
and PATRICK DZAGULONES,

Plaintiffs,

Case No. 03-72106
v. HONORABLE DENISE PAGE HOOD

UNITED PARCEL SERVICE and
LIBERTY MUTUAL INSURANCE CO.,

Defendants.

MEMORANDUM OPINION & ORDER GRANTING DEFENDANT UNITED PARCEL SERVICE'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

[May 27, 2005]

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs assert their worker's compensation benefits were wrongfully terminated and brought suit on May 29, 2003, pursuant to the federal Racketeer Influence and Corrupt Organization Act ("RICO"), 18 U.S.C. §1961, et seq., and the Worker's Disability Compensation of Act or 1969 under M.C.L. §418.101, et seq. Plaintiffs alleged violations of RICO, wrongful denial of benefits Complaint of June 17, 2003, adding a party.

On July 25, 2003, Defendants filed a Motion to

Dismiss. In addition to responding to Defendants' Motion, Plaintiffs filed a separate Motion to Amend on October 30, 2003 After conducting a hearing on both Motions, the Court issued an Order on March 31, 2004. In its Memorandum Opinion & order Re: Defendants, United Parcel Service's, & Liberty Mutual Insurance Company's, Motion to Dismiss & Plaintiffs' Motion to Amend Complaint, The Court (1) dismissed Count II of Plaintiffs' Complaint, alleging wrongful termination of benefits against Defendant UPS; (2) dismissed Count III, retaliation, against Defendant UPS; (3) dismissed Count I, RICO, against Defendant UPS pending amendment by Plaintiffs; (4) dismissed Counts I, II, and III against Defendant Liberty Mutual; (5) dismissed Defendant Liberty Mutual from the case entirely; (6) granted Plaintiff' Motion to Amend as to Count I against UPS only; and (7) denied Plaintiffs' Motion to Amend entirely with respect to Defendant Liberty Mutual. (Mar. 31, 2004 Mem. Op. & Ord. At 25-26.) The Court specified, "Plaintiff's RICO claim must fail absent amendment of the Complaint." (Id. At 15.) Despite this threshold deficiency, the Court went on the analyze Plaintiffs' RICO claim. The Court concluded, "[s]in ce Plaintiffs' Complaint not only does not demonstrate reliance, but doesn't indicate that any of the alleged fraudulent communications were communicated directly indirectly to the Plaintiffs, Plaintiffs' RICO cause of action must fail absent amendment of the Complaint." (Id. At 19.)

On April 23, 2004, Plaintiffs filed their Second Amended Complaint against both Defendant UPS and Defendant Liberty Mutual. Plaintiffs assert a RICO claim against Defendant UPS, and an Intentional Infliction of Emotional Distress (" IIED") claim against both Defendants.

This mater is before the Court on Defendant UPS" Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) or Alternatively to Stay Proceedings, filed May 4, 2004. Defendant Liberty Mutual filed a Notice of Concurrence in Defendant UPS' Motion on May 26, 2004. Defendant

UPS' Motion to Dismiss claims Plaintiffs: (1) failed to allege a fraudulent statement; (2) cannot establish proximate cause under 'RICO ; and (3) cannot support a claim for IIED. Plaintiffs filed their Response on May 25, 2004, to which Defendant UPS replied on June 9, 2004. For the reasons set forth below, the Court grants Defendant UPS' Motion to Dismiss.

II. STATEMENT OF FACTS

Plaintiff Yax received worker's compensation benefits for an alleged pre-existing back injury from October 2001 through September 2002. Plaintiff Yax alleges Defendant Liberty Mutual completed a Notice of Dispute and submitted it to the Michigan Worker's Compensation Bureau on September 17, 2002. (2d Am. Compl. At 10.) The Notice of Dispute lists the alleged reason for dispute as "[n]o medical evidence of continued disability." (Id.) Plaintiff Yax alleges this Notice was fraudulent because Defendant Liberty Mutual possessed reports from multiple doctors stating Plaintiff Yax was indeed disabled. (Id.) Plaintiff Yax further alleges Defendant UPS acted in concert with Defendant Liberty Mutual, and alleges Defendant Liberty Mutual was Defendant UPS' agent during this process. (Id.)

Plaintiff Traynor was employed with Defendant UPS loading trucks. Plaintiff Traynor received worker's compensation benefits from August 20, 2002 until March 12, 2003, for a disabling back injury. In the Second Amended Complaint, Plaintiff Traynor claims Defendant Liberty Mutual provided a Notice of Dispute to the Michigan Worker's Compensation Bureau on March 12, 2003. (Id. At 20.) Plaintiff Traynor alleges this Notice was fraudulent because the stated basis fro dispute was 'the 2/3/03 Dr. W. Higginbotham IME." (Id.) Plaintiff Traynor further alleges that "Dr. Higginbotham's report did not give Liberty any basis for termination of benefits." (Id.) Plaintiff Traynor concludes Defendant UPS was "informed of the decision of]Defendant] Liberty [Mutual], and

approved them or let them stand." (Id.) Plaintiff "Traynor also claims Defendant Liberty Mutual acted as an agent for Defendant UPS.

Plaintiff Dzagulones was employed as a UPS driver. Plaintiff Dzagulones claims he sustained nerve damage in his arm due to lifting boxes in September 199. Plaintiff Dzagulones received worker's compensation benefits from November 199 until June 2003. Plaintiff Dzagulones also points to an allegedly fraudulent Notice of Dispute filed by Defendant Liberty Mutual on March 13, 2002. (Id. At 29.) The Notice stated Defendant Liberty Mutual was "[d]isputing it based on 5/28/02 IME." (Id.) Plaintiff alleges the May 28, 2002 IME report "was false and the product of a conspiracy with defendant [UPS] and its agent Liberty Mutual to wrongfully deprive plaintiff and others of their benefits." (Id.)

III. STANDARD OF REVIEW

The Sixth Circuit held in *Windsor v. The Tennessean,* 719 F.2d 155 (6th Cir. 1983), that the standard of review "when evaluating a motion to dismiss brought pursuant to rule 12(b)(6), [is to regard] the factual allegations in the complaint...as true." Id. At 158 (quoting *Walker Process Equipment, Inc. V Food Machinery & Chemical Corp.* 382 U.S. 172, (1965)). The Windsor court went on to state, "[t]he claim should not be dismissed unless it appears beyond doubt that plaintiff can prove o set of facts in support of his claim which would entitle him to relief." Id. (Citing *Conley v Gibson,* 355 U.S. 71, 45-46 (1957)).

The standard of review under Federal Rule of Civil Procedure 12(b)(6) is liberal . "A complaint need not set down in detail all the particularities of plaintiff's claim, ' but must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Gazette v. City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir. 1994). It is plain that, although liberal , the standard does require a plaintiff to plead more than bare legal

conclusions. *See Morgan v Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir. 1987) (liberal Rule 12(b)(6) review is not afforded legal conclusions and unwarranted factual inferences); *Ana Leon T. V. Federal Reserve Bank*, 823 F.2d 928, 930 (6th Cir. F1987) (per curiam) (mere conclusions are not afford liberal Rule 12(b)(6) review). "In practice, a . . complaint must contain either direct or inferential allegations requesting all the material elements to sustain a recovery under some viable legal theory." *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993) (internal quotation marks omitted) (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2e 434, 436 (6th Cir. 1988)).

The district court must construe the complaint I a light most favorable to the Plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Allard,* 991 F.2d at 1240; *Mayer v. Mylod,* 988 F.2d 635, 638 (6th Cir. 1993). When an allegation is capable of more than one inference, it must be construed in the plaintiff's favor. *Allard,* 991 F.2d at 1240; *Mayer,* 988 F.2d at 638. Hence, a judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations. *Allard,* 991 F.2d at 1240; *Lawler v Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990)

IV. APPLICABLE LAW & ANALYSIS

A. Amendment of Plaintiffs' Complaint

[this portion is omitted from this appendix]

B. "Revised Second Amended Complaint"

[this portion is omitted from this appendix]

C. RICO

A violation of 18 U.S.C. § 1962(c), the provision of RICO upon which Plaintiffs rely to support their claim,

consists of the following elements; "(1) conduct (2) of an enterprise (3) through a patern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 (1985). "Racketeering activity' is defined in 18 U.S.C. § 1961 (1)(B) as including any act 'indict able' under certain enumerated federal criminal statutes, including 18 U.S.C. § 1341, which makes mail fraud a criminal offense, and 18 U.S.C. § 1343, which makes wire fraud a crime." *Schreiber Distributing Co. V. Serv-Well Furniture Co.,* 806 F.2e 1393, 1399 (9th Cir. 1986)

To maintain their RICO action, Plaintiffs must show that each element of mail fraud or wire fraud has been committed by Defendants. "To allege a violation of the mail fraud statute, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." *Schreiber,* 806 F.2d at f1399-1400. "Similarly, a wire fraud violations [sic] consists of (1) the formation of a scheme or artifice to defraud (2) use of the United State wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." *Id.* At q400. Plaintiffs cannot maintain a civil RICO claim against Defendants absent evidence that Defendants made misrepresentations or omissions of material fact to Plaintiffs, and evidence that Plaintiffs relied on those misrepresentations or omissions of material fact to Plaintiffs, and evidence that Plaintiffs relied on those misrepresentations or omissions to their detriment. *See Bender v. Southland Corp.,* 749 F.2d 1205, f1216 (6th Cir. 1984). *See also Blount Financial Svcs., Inc. V. Walter E. Heller & Co.,* 819 F.2d 151, 152 (6th Cir. 1987) (holding that the plaintiff must plead with particularity the false statements of fact made by the defendants to the plaintiffs and the facts showing that the plaintiff relied on those statements to its detriment); *Schreiber,* 806 F.2e at 1400 (noting that the plaintiff properly pleaded that the defendants had made misrepresentations to the plaintiff

and that the plaintiff had detrimentally relied on those statements). The defendant must make a false statement or omission of fact to the plaintiff to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim.

"In order to establish 'racketeering activity' Plaintiffs must allege a predicate act," under 18 U.S.C. § 1961(1). *Kenty v. Bank One, Columbus,* N. A. 92 F.3e 834, 389 (6th Cir. 1996). Plaintiffs alleged mail and wire fraud. Rule 9(b) of the Federal Rules of Civil Procedure provides that in a complaint alleging fraud, "the circumstances constituting fraud...shall be stated with particularity." Fed. R. Civ. P. 9(b). The purpose of Rule 9(b) is to provide fair notice to the defendant so as to allow him to prepare an informed pleading responsive to the specific allegations of fraud. *Michaels Bldg. Co. V. Ameritrust Co.,* N.A., 848 F.2d 674, 679 (6th Cir. 1988). The Sixth Circuit reads the requirement of Rule 9(b) "liberally,...requiring a plaintiff, at a minimum, to allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.," *Coffey v. Foamex L.P.,* 2 F.3d 157, 161-162 (6th Cir. 1993) (internal quotation marks and citation omitted).

This liberal reading stems from the influence of Rule 8, which "requires a 'sho rt and pain statement of the claim,' and calls for 'simple, concise, and direct' allegations." *See id.; Michaels Bldg. Co.,* 848 F.2d at 679 (quoting Fed. R. Civ. P. 8(a), (e). Even against the Rule 8 "backdrop admonition of simplicity in pleading," *id.*, "allegations of fraudulent misrepresentation[s] must be made with sufficient particularity and with a sufficient factual basis to support an inference that they were knowingly made." *Coffey,* 2 F.3d at 162 (internal quotation marks and citation omitted).

As a preliminary matter, Plaintiffs' RICO claim against Defendant Liberty Mutual is not allowed , as per the Courts March 31, 2004 Order. With respect to Defendant UPS, Plaintiffs show no alleged false statements with time, place, and content. Plaintiff Yax's benefits were

terminated due tot he determination that no medical evidence of a continued disability existed. This statement is not false, as Defendants did terminate Plaintiff Yax's benefits and claimed it was based on no medical evidence of continued disability. Plaintiff Traynor claims fraud based on the Notice of Dispute filed and Dr. Higginbotham's IME report. Plaintiff Traynor cannot demonstrate falsehood because Defendant UPS did dispute the temporary total disability based on Dr. Higginbotham's IME report. Plaintiff Traynor cannot demonstrate falsehood because Defendant UPS did dispute the temporary total disability based on Dr. Higginbotham's IME report. Plaintiff Dzagulones' claims suffer from the same failing: Defendant UPS did dispute the temporary total disability based on the doctor's report. Plaintiff Dzagulones also alleges Defendants conspired to produce a deliberately misrepresented IME report, but he presents no evidence supporting the existence of the alleged conspiracy. A bare allegation of falsity is not enough to sustain a claim in the face of a Rule 12(b)(6) motion; nor can a bare allegation of conspiracy survive a motion to dismiss.

Plaintiffs fail to show Defendants' statements were intended to mislead Plaintiffs. Defendants claim the statements were made to the Worker's Compensation Board, and only "incidentally" to Plaintiffs. Because they were not aimed directly at Plaintiffs, Defendants argue the statements could not have been intended to mislead Plaintiffs. Plaintiffs argue that the Court cannot examine the intent of Defendant UPS in a Rule 12(b)(6) motion, and must instead accept Plaintiffs' allegations of intent to mislead as true. However, the only reason IMEs are taken and reports sent to the Worker's Compensation Board is to allow the Board to make a decision about disability payments. Information about the disputes and the IMEs was not provided to mislead Plaintiffs but to put them on notice of Defendant UPS disputing their disability and giving Defendant UPS' reason for dispute: the IME reports of no disability. The truthfulness of the IME reports was a question of fact previously determined by the Worker's

Compensation Board.

Defendants' alleged misrepresentations cannot be demonstrated to have been intended for Plaintiffs' reliance–to induce them to part with their worker's compensation rights. The statements may have been a scheme perpetrated on the Worker's Compensation Board to deny further benefits, but the statements cannot be said to have been directed to induce Plaintiffs to give up their worker's compensation rights, as the filing of the Notice of Dispute of worker's compensation disability by Defendant UPS demonstrates.

With respect to proximate cause and justifiable reliance, Plaintiffs claim reliance in theat they paid their own medical bills which Defendants would have paid as well as hiring an attorney to obtain their benefits. I the alternative , Plaintiffs claim their Complaint is properly pled and that they are not required to prove justifiable reliance under 18 U.S.C. § 1512. The Court finds Plaintiffs must necessarily prove justifiable reliance because they must demonstrate predicate acts as an element of their claim.

Plaintiffs argue in favor of invoking Federal ?rule of Civil Procedure Rule 11 (b)(3), regarding the use of mail or wire merely as a tool for achievement of fraud, to make Rule 9 (b) inapplicable in this instance. Plaintiffs cite *Rotella v. Wood,* 528 U.S. 549 (2000), in support of this proposition. In *Rotella*, the Supreme Court considered whether the accrual of a patient's RICO action was delayed until he actually discovered the alleged patern of racketeering activity. The Court held accrual of such an action is not delayed; the relevant claims period begins to run from the time the plaintiff discovers the injury. *Id.* at 558-59. Rotella also held that "while we assume the Rule 9(b) will exact some cost" on plaintiff, enforcing Rule 9(b) in its most stringent form "ignores the flexibility provided by rule 11(b)(3), allowing pleadings based on evidence *reasonably anticipated* after further investigation or discovery." Id. At 560 (emphasis added). Plaintiff's cannot show a reasonable anticipation of evidence

supporting their claims following based on pure speculation alone. While rotella notes the interplay between Rule 9 and Rule 11, it does not eliminate the standards of Rule 9 (b). Even with a reduced burden, Plaintiffs cannot survive dismissal of their claims.

Plaintiffs also assert rule 9(b) is inapplicable where the allegedly fraudulent communications are in the hands of Defendants. In support of this contention, Plaintiffs rely on *Abels v Farmers Commodities Corp.* 259 F.3d 910 (8th Cir. 2001). Notwithstanding whether Abels is applicable under Sixth Circuit precedent, see Mar. 30 em. Op. & ord. At 12 (describing Sixth Circuit Pleading requirements), the Court finds Abels is distinguishable from the present matter in at lease two respects. First, the plaintiffs in Abels actually pled particularized fraudulent communications is their complaint. The same cannot be said of Plaintiffs in any of their various pleadings submitted to the Court. Second, Plaintiffs have already gone through the worker's compensation process. Abels does not provide Plaintiffs with ability to meet the requirements of Rule 9 (b).

The Court believes Plaintiffs present a circular argument since they allege the fraud was the submissions to the Worker' s Compensation Board and to themselves. Alternatively, the alleged scheme to defraud was the communication via medical reports between Defendants ad the doctors. Yet Plaintiffs in fact claim Defendants provided false and is leading information to the Worker's Compensation board. Plaintiffs have not delineated "with adequate particularity in the body of the complaint, the specific circumstance constituting the overall fraudulent scheme." (Pls.' Resp. At 15.)

D. IIED

[this portion is omitted from Appendix]

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is granted.

Accordingly,

IT IS ORDERED that Defendant UPS' Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) or Alternatively to Stay Proceedings **[Docket o. 27, filed May 4, 2004]** is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Second Amended Complaint is DISMISSED with prejudice.

DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

DATED: MAY 27, 2005

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERRI YAX, BRYAN TRAYNOR,
HEIDI WALLACE, DANIEL HOLCOMB,
and PATRICK DZAGULONES,

Plaintiffs,

Civil Action No: 03-CV-72106
HONORABLE DENISE PAGE HOOD
MAGISTRATE JUDGE WALLACE CAPEL, JR.

UNITED PARCEL SERVICE and
LIBERTY MUTUAL INSURANCE
COMPANY, foreign corporations,

Defendants.

MEMORANDUM OPINION & ORDER RE:
DEFENDANTS',
UNITED PARCEL SERVICE'S, & LIBERTY MUTUAL
INSURANCE COMPANY'S,
MOTION TO DISMISS & PLAINTIFFS' MOTION TO
AMEND COMPLAINT
[March 31, 2004]
[Not Reproduced in Full in this Appendix]

I. Introduction

This matter is before the Court on Defendant's, United Parcel Service's (UPS), Motion to Dismiss pursuant to Fed. R. Civ. P. 12 (b) (6). Plaintiffs assert that their worker's compensation benefits were wrongfully terminated and bring their cause of action pursuant to the federal Racketeer Influence and Corrupt Organization Act (RICO) under 18 U.S.C. § 1961, et. seq. and pursuant to the Worker's Disability Compensation Act of 1969 under M.C.L. §418.101, et. seq. Defendant UPS asserts that Plaintiffs

cause of action should be dismissed for several reasons. First Defendant UPS asserts that Plaintiff's RICO claim fails to state a claim upon which relief can be granted because the Complaint is not pled with particularity and there are no allegations of reliance. Second, it is alleged that Plaintiff's RICO claim is barred by the McCarran-Ferguson Act. Third, Defendant UPS contends that all of Plaintiff's claims are barred by the Doctrine of Primary Jurisdiction. Fourth, Defendant UPS claims that Plaintiffs count entitled "Wrongful Termination of Benefits" is not a cognizable cause of action. Finally, Defendant UPS asserts that there are no allegations of retaliation in Plaintiffs' Complaint which are necessary in order to bring a viable worker's compensation cause of action.

Defendant Liberty Mutual Insurance (LMI) filed its Motion of Concurrence with Defendant UPS' Motion to Dismiss. Plaintiffs filed their response' to Defendant UPS' Motion to Dismiss. Defendant UPS filed its reply; and Plaintiff filed a supplemental reply brief. Plaintiffs subsequently filed a Motion to Amend Complaint to which Defendants filed their response.

II. Statement of Facts

There are five Plaintiffs, each with a different set of facts. Plaintiff Yax was receiving worker's compensation benefits for an alleged pre-existing back injury beginning in October 2001. However, Defendant LMI filed a Notice of Dispute; and in September 2002, Plaintiff Yax ceased receiving worker's compensation benefits. Plaintiff Yax alleges that Defendant LMI's actions were fraudulent and that Defendants LMI and UPS conspired to fraudulently terminate her worker's compensation benefits.

Plaintiff Traynor was employed with Defendant UPS loading the trucks and also received worker's compensation benefits from August 20, 2002 until March 12, 2003, for a disabling back injury. Plaintiff Traynor's benefits ceased after Defendant LMI disputed his right to receive continued benefits. Plaintiff Traynor also claims that Defendants LMI

and UPS conspired to fraudulently deny him worker's compensation benefits.

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1 Although the pleading is a response, it is entitled "Plaintiff's *Reply* to UPS' Motion to Dismiss Pursuant to FRCP 12(b)(6). *(emphasis added)*

Plaintiff Holcomb drove trucks for Defendant UPS and sustained nerve damage in his arm as a result of lifting boxes in October 1993. Plaintiff Holcomb received worker's compensation benefits for several years until he was examined in March 2003, at which time the physician found that he was no longer disabled. As a result of the physician's diagnosis, Plaintiff Holcomb's worker's compensation benefits stopped. Plaintiff Holcomb alleges that the physician's opinion was tainted by Defendants LMI and UPS as part of the conspiracy to fraudulently deprive Plaintiff Holcomb of worker's compensation benefits.

Plaintiff Wallace was employed with Defendant UPS as a part-time clerk and claims that in October 2002, she sustained a shoulder injury while lifting a heavy box. As a result, Plaintiff Wallace began to receive worker's compensation benefits. Plaintiff Wallace's allegations are as follows:

> Both before and after her injury, Heidi Wallace was training at her own expense to become a medical assistant. Upon completion of her course and placement in a job, she would have earned more money than she was making at UPS, which would have ended UPS' obligation to pay worker's compensation wage loss benefits. This fact was known to defendants. Nevertheless defendant insisted she seek full-time work under the guidance of Sharon Murphy of Brown Rehabilitation Services. Plaintiff did so. However, plaintiff dressed casually for one meeting with Sharon Murphy, not knowing that Murphy wanted her to wear

> clothes which Murphy thought were more appropriate for going on a job interview. Because of this misunderstanding over clothes, Eric Bouler of Liberty's Indianapolis claims office terminated plaintiffs benefits.

(Plaintiffs First Amended Complaint, 1165, pp. 18-19). Plaintiff Wallace claims that Defendants LMI and UPS and Sharon Murphy conspired to deprive and defraud Plaintiff Wallace of her worker's compensation benefits.

Finally, Plaintiff Dzagulones, who was employed as a UPS driver, claims that he also sustained nerve damage in his arm due to lifting boxes in September 1999. Plaintiff Dzagulones received worker's compensation benefits from November 1999 until June 2003. Plaintiff Dzagulones asserts that his worker's compensation benefits were terminated after Defendant LMI received a supplemental medical report which stated that he had an "ongoing work related pathology." *(Plaintiffs First Amended Complaint,* 111180-81). Plaintiff Dzagulones alleges that Defendant offered to settle Plaintiffs claim for $70,000.00 as opposed to paying him benefits indefinitely. Plaintiff Dzagulones was allegedly given the choice of accepting the settlement or engaging in the dispute process. Plaintiff chose not to accept the settlement and claims that Defendants LMI and UPS conspired to fraudulently terminate his worker's compensation benefits.

III. Standard of Review

The Sixth Circuit held in *Windsor v. The Tennessean,* 719 F.2d 155 (6th Cir. 1983) that the standard of review "when evaluating a motion to dismiss brought pursuant to rule 12 (b) (6), [is to regard] the factual allegations in the complaint . . . as true." Id. at 158 *(quoting* Walker Process Equipment, *Inc.* v. *Food Machinery & Chemical* Corp., 382 U.S. 172, (1965)). The Windsor court went on to say that "[t]he claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him

to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The standard of review for dismissal of a complaint under Fed.R.Civ.P. 12 (b) (6) is liberal. "'A complaint need not set down in detail all the particularities of a plaintiffs claim,' but must simply `give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests.'"Gazette v. *City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir.1994). It is plain that, although liberal, the standard does require that a plaintiff plead more than bare legal conclusions. *See, Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir.1987) (liberal Rule 12 (b) (6) review is not afforded legal conclusions and unwarranted factual inferences) ; Ana Leon T. v. *Federal Reserve Bank,* 823 F.2d 928, 930 (6th Cir.) (per curiam) (mere conclusions are not afforded liberal Rule 12 (b) (6) review). "In practice, a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." Allard v. *Weitzman* (In re DeLorean Motor Co.) , 991 F.2d 1236, 1240 (6th Cir. 1993) (internal quotation marks omitted) *(quoting Scheid* v. Fanny Farmer *Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir.1988)).

The district court must construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Allard,* 991 F.2d at 1240; *Mayer* v. *Mylod,* 988 F.2d 635, 638 (6 th Cir. 1993). When an allegation is capable of more than one inference, it must be construed in the plaintiffs favor. *Allard,* 991 F.2d at 1240; Mayer, 988 F.2d at 638. Hence, a judge may not grant a Rule 12 (b) (6) motion based on a disbelief of a complaint's factual allegations. Allard, 991 F.2d at 1240; *Lawler* v. *Marshall,* 898 F.2d 1196, 1199 (6th Cir.1990). N.

IV. Applicable Law &Analysis

A. Primary Jurisdiction
[this portion omitted from Appendix]

B. McCarran-Ferguson Act's Application
[this portion omitted from Appendix]

C. Plaintiff's RICO Claim

A violation of 18 U.S.C. § 1962(c), the provision of RICO upon which Plaintiffs rely to support their claim, consists of the following elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima,* S.P.R.L. *v.* Imrex Co., 473 U.S. 479, 496 1985). "'Racketeering activity' is defined in 18 U.S.C. § 1961(1) (B) as including any act 'indictable' under certain enumerated federal criminal statutes, including 18 U.S.C. § 1341, which makes mail fraud a criminal offense, and 18 U.S.C. § 1343, which makes wire fraud a crime." *Schreiber Distributing Co. v. Serv-Well Furniture* Co., 806 F.2d 1393, 1399 (9th Cir.1986).

To maintain their RICO action, Plaintiffs must show that each element of mail fraud or wire fraud has been committed by the Defendants. "To allege a violation of the mail fraud statute, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." *Schreiber,* 806 F.2d at 1399 - 1400. "Similarly, a wire fraud violations [sic] consists f (1) the formation of a scheme or artifice to defraud (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." *Id.* at 1400. Plaintiffs cannot maintain a civil RICO claim against these Defendants absent evidence that the Defendants made misrepresentations or omissions of material fact to the Plaintiffs and evidence that Plaintiffs relied on those misrepresentations or omissions to its detriment. *See Bender* v. *Southland* Corp., 749 F.2d 1205, 1216 (6th Cir.1984). *See also Blount Financial Svcs., Inc.* v.

Walter E. *Heller* & Co., 819 F.2d 151, 152 (6th Cir.1987) (holding that the plaintiff must plead with particularity the false statements of fact made by the defendants to the plaintiffs and the facts showing that the plaintiff relied on those statements to its detriment); *Schreiber,* 806 F.2d at 1400 (noting that the plaintiff properly pleaded that the defendants had made misrepresentations to the plaintiff and that the plaintiff had detrimentally relied on those statements). The defendant must make a false statement or omission of fact to the plaintiff to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim.

1. Racketeering Activity

I. Plead with Particularity

In order to establish 'racketeering activity' Plaintiffs must allege a predicate act," *Kenty v. Bank One, Columbus, N.A.,* 92 F.3d 384, 389 (6th Cir.1996), under 18 U.S.C. § 1961(1). Plaintiffs alleged mail and wire fraud. Rule 9 (b) of the Federal Rules of Civil Procedure provides that in a complaint alleging fraud, "the circumstances constituting fraud ... shall be stated with particularity." *Fed.R.Civ.P. 9 (b)* . The purpose of Rule 9(b) is to provide fair notice to the defendant so as to allow him to prepare an informed pleading responsive to the specific allegations of fraud. *Michaels Bldg.v Ameritruist Co.,* N.A., 848 F.2d 674, 679 (6th Cir.1988). The Sixth Circuit reads rule 9(b)'s requirement "liberally, ... requiring a plaintiff, at a minimum, to allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Coffey v. Foamex L.P.,* 2 F.3d 157, 161- 62 (6th Cir. 1993) *(internal quotation* marks *and citation omitted)* . This liberal reading stems from the influence of Rule 8, which "requires a 'short and plain statement of the claim,' and calls for 'simple, concise, and direct' allegations." See *id.; Michaels Bldg. Co.,* 848 F.2d at 679 (quoting Fed.R.Civ.P. 8(a), (e)) .

Even against Rule 8's "backdrop admonition of simplicity in pleading," *id.,* " [h]owever, allegations of fraudulent misrepresentations] must be made with

sufficient particularity and with a sufficient factual basis to support an inference that they were knowingly made." *Coffey,* 2 F.3d at 162 (internal *quotation* marks and *citation omitted)* . The elements of mail and wire fraud are: (1) a scheme to defraud, and (2) use of the mails, or of an interstate electronic communication, respectively, in furtherance of the scheme. *United States* v. Brown, 147 F.3d 477, 483 (6` h Cir. 1998). A scheme to defraud consists of intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the designed end. To allege intentional fraud, there must be proof of misrepresentations or omissions which were reasonably calculated to deceive persons of ordinary prudence and comprehension. Thus, Plaintiffs in this matter must allege with particularity a false statement of fact made by the Defendants which the Plaintiffs relied on. *Kenty,* 92 F.3d at 389-90.

Plaintiffs' complaint avers that the Defendants fraudulently conspired to deny Plaintiffs worker's compensation benefits. No specific statements are alleged to have been said by any individuals that would substantiate Plaintiffs' claim. In fact no statements are alleged to have been said directly to Plaintiffs, but rather the allegation is that Defendants LMI and UPS conspired with each other, or conspired with physicians or conspired with anyone in a position to support Plaintiffs' claim that they were entitled to worker's compensation benefits in an effort to wrongfully terminate Plaintiffs' worker's compensation benefits.

Plaintiffs' response is two-fold. First they argue that the Complaint does point to specific individuals making fraudulent communications. Second, even if the Court were to find that Plaintiffs' pleadings are pled insufficiently to survive Defendant's Motion, *Rotella v. Wood,* 528 U.S. 549 (2000) allegedly stands for the proposition that the particularity requirements are to be relaxed in some RICO claims.

Upon reviewing Plaintiffs Complaint and Amended

Complaint, the Court finds that the Plaintiffs have failed to plead their RICO claim with particularity. Plaintiffs' Complaint contains alleged statements such as: "Liberty expressly or implied [ly] communicated to Dr. Desantis that it wanted her to write a report stating Daniel Holcomb was not disabled, and state that Mr. Holcomb has no nerve impairment measurable on an EMG/nerve conduction study" *"Plaintiffs Responsive Motion to Dismiss, pg. 15,* 1149) "Liberty's cut-off of benefits constituted fraudulent denial of benefits via mail and electronic communications." *Id.;* "UPS officials were informed of the actions and decisions of Liberty, and approved them or let them stand." *(Plaintiff s Responsive e* Motion to *Dismiss, pg. 12,* ¶29); "Liberty employed Desantis in many worker's compensation claims, expressly or impliedly communicating to her that it wanted her to write a report which it could use to deny benefits. *(Plaintiffs Responsive e Motion to Dismiss, pg. 13, IBS)* .

Although these communications are set forth in the Complaint, there is no particularity as to the time, place, or content of these communications. From the above set forth communications, it is alleged that someone from Defendant LMI communicated with certain named individuals some information that led the named individual to recommend the cessation of worker's compensation benefits. However, the Court does not find these communications to be 'particular' or specific as to time, place and content because it is not apparent to the Court what the communication entailed, when it was communicated and from whom the communication was given. The Court finds that Plaintiff's Complaint is not pled sufficiently to meet the 'particularity' requirement; and Plaintiffs' RICO claim must fail absent amendment of the Complaint. However, for the purpose of completeness, the Court will address the remainder of the RICO analysis.

2. Pattern of Racketeering Activity

Next, the Court turns to the substance of Plaintiffs Complaint to determine whether it sufficiently alleges a pattern of racketeering activity. Under Rule 12 (b) (6) all of

the factual allegations are accepted as true. According to 18 U.S.C. §19b1(5), a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . " The Supreme Court has added "flesh" to the meaning of pattern in two major cases: *Sedima,* S.P.R.L. *v.* Imrex Co., Inc., 473 U.S. 479 (1985); and *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229 (1989). Under *Sedima,* it is the "actor of continuity plus relationship which combines to produce a pattern." *Sedima,* 473 U.S. 479, 496 n. 14. The Court further examined the issue of "continuity plus relationship" in *H.J. Inc.,* where the Court held that "it is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged." H.J. Inc., 492 U.S. at 238. "Relationship" exists where the conduct in question "embraces criminal acts t hat have the same or similar purposes, results, participants, victims or methods of commission . . . and are not isolated events." H.J. *Inc.,* 492 U.S. at 240. "Continuity" is primarily a temporal concept. It refers to a "closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." H.J. Inc., 492 U.S. at 241.

Plaintiff's Complaint sets forth the situation of five different former employees of Defendant UPS as illustrated below:

Former *Employees*	*Date* of Injury	Date Benefits Began	Date Benefits Ended	Injury
Sherri Yax	pre-existing	app. 10/1/01	app. 9/17/02	back injury
Bryan Traynor-driver	8/20/02	app. 9/02	3/12/03	back injury
Heidi Wallace-clerk	10/22/02	app. 9/02	shoulder injury	
Daniel Holcomb-driver his arm	10/19/93	app. 11/93	app. 3/03	nerve damage in
Patrick Dzagulones-driver	9/29/9911/99	6/03	nerve damage in his arm	

This Circuit in *Fleischhauer* v. *Feltner,* 879 F.2d 1290 (6 th Cir.1989) has adopted what some have characterized as the "multi-factor test" for determining whether a pattern exists in a given case. Specifically, the court held that "kin determining whether the predicate acts

are sufficiently continuous and related ... [the following facts are relevant]: the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Feltner,* 879 F.2d at 1297 (quoting *Liquid Air Corp. V. Rogers,* 834 F.2d 1297, 1304 (7th cir.1987). Based upon a review of Plaintiff's Complaint and the applicable standard for establishing a pattern of racketeering activity, the Court finds that Plaintiffs' Complaint is sufficient in that regard.

3. Reliance

Defendant UPS argues that since Plaintiffs did not plead reliance in their Complaint (Plaintiffs relied upon Defendants UPS and LMI's misrepresentations which caused them injury), Plaintiffs' RICO claim must fail, as reliance is an element of a RICO cause of action. Plaintiffs contend that reliance is not an element of a RICO claim and therefore does not need to be pled in order for their claim to survive Defendant UPS' Motion to Dismiss. The Court finds that there is truth to both parties' arguments.

It is true that at common law a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception, and some courts have imported this requirement into RICO actions where the predicate acts comprise mail or wire fraud. Blount *Financial Services, Inc.* v. *Walter E. Heller and* Co., 819 F.2d 151, 152 (6th Cir.1987). However, RICO bases its own brand of civil liability simply on the commission of specified criminal acts--here, criminal fraud--so long as they comprise a "pattern of racketeering activity"; and criminal fraud under the federal statute does not require "reliance" by anyone: it *is* enough that the defendant sought to deceive, whether or not he succeeded. *See Neder v. United States,* 527 U.S. 1, 24 (1999) ("The common-law requirement[ ] of 'justifiable reliance' [has] no place in the federal fraud statutes."). *Neder* states:

> [T] he fraud statutes [do] not incorporate all the elements of common-law fraud. The common-law requirements of "justifiable reliance" and "damages," for example, plainly

have no place in the federal fraud statutes. See, e.g., United States v. Stewart, 872 F.2d 957, 960 (C.A.10 1989) (" [Under the mail fraud statute,] the government does not have to prove actual reliance upon the defendant's misrepresentations"); United States v. Rowe, 56 F.2d 747, 749 (C.A.2 1932) (L. Hand, J.) ("Civilly of course the [mail fraud statute] would fail without proof of damage, but that has no application to criminal liability")

Therefore, the element of 'reliance' is not necessary for Plaintiffs to plead or prove in to order to properly set forth a prima facie case regarding a RICO claim. However, Plaintiffs face another hurdle which does involve pleading reliance; and that is proximate causation.

It is settled that a RICO plaintiff must establish proximate causation *See Holmes v. Securities* Investor Prot. Corp., 503 U.S. 258, 265-66 (1992) (rejecting argument that plaintiff can recover merely by showing "but for" causation of plaintiffs injury as too expansive a reading of statute's "by reason of language); *Ocean* Energy II, *Inc.* v. *Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989) ("Rather than construing section 1964(c) as imposing an artificial distinction between direct and indirect injuries, we believe that *Sedima* 's caused by' and 'flow from' language instructs us to employ a traditional causation analysis in determining whether a RICO plaintiff has been injured `by reason of a section 1962 violation."). Proximate cause in RICO cases bears the same meaning as in any other type of case where proximate cause is an element. *See Holmes,* 503 U.S. at 268.

However, as noted above, "justifiable reliance" is more appropriately a part of the proximate cause analysis. *Summit Properties Inc. v. Hoechst Celanese* Corp., 214 F.3d at 558-59 (5th Cir. 2000) ("The question before us is whether a plaintiffs reliance on the predicate mail or wire fraud is necessary in order to establish proximate causation."). Although the mail and wire fraud crimes do not require reliance as an element of criminal prosecution, see *Neder* v.

United States, 527 U.S. 1, 24-25 (1999), in a RICO claim based on wire or mail fraud as a predicate act, the plaintiff must show that the particular misrepresentation constituting such fraud was directed at the Plaintiffs and that he relied on the misrepresentation. *See Summit Props.*, 214 F.3d at 559. *Andrews v. American Nat. Red Cross, Inc.*, 176 F.Supp.2d 673, 690(W.D.Tex.,2001). Therefore, although justifiable reliance is not necessary to establish predicate acts of mail and wire fraud, Plaintiffs must nonetheless establish justifiable reliance to satisfy a different element of his RICO claim, that of injury to plaintiffs business or property and proximate causation. After a plaintiff shows that defendant has violated section 1962, he must further show that the predicate act caused the injury for which plaintiff seeks recovery. *Feeley v. Whitman Corp.*, 65 F.Supp.2d 164, 174 (S.D.N.Y.,1999).

> RICO provides that "any person injured in his business or property by reason of a RICO violation may bring a civil action to recover treble damages." 18 U.S.C. § 1964(c). Courts have interpreted the phrase "by reason of' to require that there be a causal connection between the prohibited conduct and the plaintiffs injury. Where mail or wire fraud is the RICO predicate act, plaintiff must show justifiable reliance to establish causation.*Id.*

Although Plaintiffs prevail on their argument that 'reliance' is not a required element of a RICO claim, it is a necessary element to prove causation, which is a required element of a RICO action. Since Plaintiffs' Complaint not only does not demonstrate reliance, but does not indicate that any of the alleged fraudulent communications were communicated directly or indirectly to the Plaintiffs, Plaintiffs' RICO cause of action must fail absent amendment of the Complaint.

D. Wrongful Termination of Worker's Compensation Benefits

[this portion omitted from Appendix]

F. Plaintiffs' Motion to Amend
[This portion omitted from Appendix]

V. Conclusion

Based upon the foregoing, the Court finds that Defendants' Motion to Dismiss is GRANTED as to Defendant LMI and UPS. Plaintiffs' Motion to Amend Complaint is GRANTED as to UPS only, and DENIED as to LMI. Such amendment is to take place within 21 days from the date of this Order.

IT IS HEREBY ORDERED that Defendant's UPS' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b) (6) [Docket No: 9-1, filed July 25, 2003] is GRANTED as to Count II (Wrongful Termination of Benefits) and Count III (Retaliation) of Plaintiff's Amended Complaint.

IT IS FURTHER ORDERED that UPS' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12 (b) (6) [Docket No: 9-1, filed July 25, 2003] is GRANTED as to Count I (RICO), subject to Plaintiffs' amendment of their Amended Complaint within 21 days from the date of this Order.

IT IS FURTHER ORDERED that Defendant's Liberty Mutual Insurance's Concurrence in Motion by Defendant UPS to Dismiss Pursuant to Federal Rule of Civil Procedure 12 (b) (6) [Docket No: 10-1, filed August 8, 2003] is GRANTED as to Count I (RICO), Count II (Wrongful Termination of Benefits) and Count III (Retaliation) of Plaintiffs Amended Complaint and Liberty Mutual Insurance is DISMISSED.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Amend Complaint **[Docket No: 15, 1, filed October 30, 2003] is GRANTED** as to Count I (RICO) of Plaintiffs' Amended Complaint and only as against UPS, and that the amended Complaint must be filed with this Court within 21 days from the entry of this Order.

IT IS FURTHER ORDERED that the parties appear for a status conference on June 1, 2004 @3:30 p.m.

DENISE PAGE HOOD
UNITED STATES DISTRICT COURT JUDGE

DATE: MAR 3 1 2004

UNITED STATES DISTRICT COURT
EASTER DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERRI YAX, BRYAN TRYNOR,
and PATRICK DZAGULOUNES,

Plaintiffs,

Case No. 03-72106
v. HONORABLE DENISE PAGE HOOD

UNITED PARCEL SERVICE and
LIBERTY MUTUAL INSURANCE CO.,

Defendants.

JUDGMENT

In accordance with the Order entered this date, and the Court having entered an Order dismissing this matter.

Accordingly, judgment is entered in favor of Defendants and against Plaintiffs.

Approved:

DAVID J. WEAVER
CLERK OF THE COURT

By: _____
Deputy Clerk

_____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

DATED: May 27 2005
Detroit, Michigan

UNITED STATES DISTRICT COURT

IN THE EASTERN DISTRICT OF MICHIGAN

SHERRI YAX, BRIAN TRAYNOR,
and PATRICK DZAGULONES,

Case No.: 03-72106
Hon. Denise Page Hood

Magistrate Judge Wallace Capel, Jr

Plaintiffs,

v

UNITED PARCEL SERVICE
and LIBERTY MUTUAL
INSURANCE COMPANY,
foreign corporations,

Defendants.

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SECOND AMENDED COMPLAINT AND JURY DEMAND [not reproduced in full]

7. One or more of these persons committed extortion, attempted extortion, mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently terminating or denying benefits, or by fraudulently terminating benefits because a person refused to settle a claim for the amount offered by Liberty Mutual. This fraud was accomplished by use of the United States mails and by electronic communications in violation of 18 USC 1341 and 1343, and in violation of MCL 750.280. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery. In particular:

a. On Sept. 17, 2002, Peggy Neukam of Liberty Mutual, Indianapolis, IN, acting as agent for and in concert with United Parcel Service, mailed via the Postal Service from Indianapolis, IN, to Sherri Yax, 5734 Arcola, Garden City, MI, a Notice of Dispute announcing that Liberty and UPS terminated the benefits of Sherri Yax for the reason "No medical evidence for continued disability." This statement was fraudulent because UPS and Liberty possessed multiple reports from multiple doctors stating Sherri Yax was disabled.

b. UPS approved and continued the termination of Sherri Yax's benefits after being told through counsel that medical reports stated she was disabled, and after being told through counsel that Liberty had denied benefits on the ground there was "no medical evidence for continued disability."

c. On March 13, 2003, Peggy Neukam of Liberty Mutual, Indianapolis, IN, acting as agent for and in concert with United Parcel Service, mailed via the Postal Service from Indianapolis, IN, mailed to Brian Traynor, 899 Woodland, Pontiac MI 48340, a Notice of Dispute, stating "D isputing ttd [temporary total disability] based on 2/3/03 Dr. W. Higginbotham IME." Dr. Higginbotham's report did not give Liberty any basis for termination of benefits, and in fact supported plaintiff's claim. The report stated Mr. Traynor's disability was due to symptomatic aggravation at work of a pre-existing condition, thus informing Liberty that plaintiff was disabled by a condition which was compensable under Michigan law. This cut-off of benefits by Liberty Mutual and United Parcel Service constituted fraudulent denial of benefits via mail and electronic communications.

d. On August 17, 2003, Peggy Neukam of Liberty Mutual, Indianapolis IN, acting as agent for and in concert with United Parcel Service, mailed via the Postal Service from Indianapolis, IN, to Heidi Wallace, 5842 Ogden, Detroit MI 48210, a Notice of Dispute stating "Disputing ongoing TTD benefits due to work avoidance." This communication to Heidi Wallace was false and fraudulent.

e. (i) With regard to the

following communications, plaintiff is unable to identify the date, employee or exact content of the communications. However, the allegation is based on information and belief, and is likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

(ii) Liberty expressly or implied communicated to Drs. Annette Desantis and Paul Drouillard that it wanted them to write reports stating Brian Traynor, Sherri Yax, Patrick Dzagulones and Daniel Holcomb were not disabled due to work-related injuries, regardless of the true circumstances. Liberty's actions violated 18 USC §1512. These communications were by mail and wire and are not in the possession of plaintiff but are in the possession of Liberty Mutual and or United Parcel Service.

(iii) In September 2001, Liberty retained Dr. Terry Weingarden to examine Daniel Holcomb. Dr. Weingarden had completely or substantially retired from the practice medicine, so that his sole income or the great bulk of his income came from doing examinations for insurance companies and self-insured employers, and from his ownership interest in a company which provided examinations for insurance companies and self-insured

employers. Liberty expressly or implied communicated to Dr. Weingarden that it wanted him to write a report stating that plaintiff did not have a work-related disability, and he wrote such a report. This report was false, according to the surgeon who had treated plaintiff for many years. Liberty acknowledged the falsity of the report by not terminating plaintiff's benefits even though under the Michigan Workers Disability Compensation Act, MCL 418.101 et seq, it could have cited the report as a ground for termination of benefits.

(iv) From November 1999 until June 9, 2003, Patrick Dzagulones was being paid workers compensation voluntarily by Liberty Mutual and UPS due to injury at work to his left arm. On April 22, 2003, Carmelo Deogracias of Liberty's Indianapolis, IN, office sent to Mr. Dzagulones at 3947 Jackson, Dearborn Heights, MI 48125, a letter via the USPS ordering Mr. Dzagulones to be examined by Dr. Annette Desantis. Annette Desantis wrote a report stating plaintiff was not disabled by a work related injury. Mr. Deogracias cut off benefits after receiving this report. Plaintiff called him to ask why his benefits were being terminated. In a June 13, 2003, phone call, between plaintiff's residence in Dearborn Heights, MI, and Liberty's office in Indianapolis, IN, Mr. Deogracias told

plaintiff, "You can either go through the dispute process or you can settle your claim. There is a $70,000 offer on the table." Mr. Deogracias implied that one reason for the cut-off of benefits was the multiple prior injuries and claims for workers compensation that plaintiff had had. Mr. Deogracias told plaintiff that he (plaintiff) had had 18 reported injuries at work for UPS, described to plaintiff many of these injuries, and said that UPS had spent over $7,000 on treating these injuries. He told plaintiff that Karen Vaughan of UPS approved what he was doing. Plaintiff refused to settle for the amount offered.

****

30. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees, medical care and mileage to and from medical care. Plaintiff relied on the communication to the extent he suffered the financial loss of having to pay attorney fees, medical care and medical mileage.

UNITED STATES DISTRICT COURT

IN THE EASTERN DISTRICT OF MICHIGAN

SHERRI YAX, BRIAN TRAYNOR,
HEIDI WALLACE, DANIEL
HOLCOMB and
PATRICK DZAGULONES, Case No.: 03-72106
Hon. Denise Page Hood
Plaintiffs,
Magistrate Judge Wallace
Capel, Jr

v

UNITED PARCEL SERVICE
and LIBERTY MUTUAL
INSURANCE COMPANY, foreign corporations,

Defendants.
_____/

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MARSHALL LASSER PC
Attorney for plaintiffs
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248-647-7722
_____/

FIRST AMENDED COMPLAINT AND JURY DEMAND [not reproduced in full]

JURISDICTION AND VENUE

1. Federal question jurisdiction is conferred by plaintiffs' claims under the Federal Racketeer Influence and Corrupt Organizations Act, 18 USC §1961 et seq (RICO). Diversity of citizenship jurisdiction is conferred by 28 USC §1332 (plaintiffs are citizens of Michigan,

defendants are citizens of other states, and the amounts in controversy exceed $75,000). Pendant jurisdiction of state claims is conferred by 28 USC §1367.

2. Venue is properly laid in the Federal District Court for the Eastern District of Michigan because plaintiffs reside in that district and defendants do business in person and through their agents and representatives in that district, in Wayne and Oakland Counties, Michigan.

PARTIES

3. Plaintiffs Sherri Yax, Brian Traynor, Heidi Wallace, Daniel Holcomb and Patrick Dzagulones reside within the jurisdiction of the court. They were or are employees of United Parcel Service. United Parcel Services (UPS) and Liberty Mutual Insurance Company are corporations domiciled outside Michigan.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

4. United Parcel Service employed each of the plaintiffs. It complied with its obligation to provide its Michigan employees Michigan workers disability compensation insurance by signing a contract of insurance with Liberty Mutual Insurance Company. However, on information and belief, the contract of insurance effectively and perhaps contractually made UPS a self-insured for all or most of its losses.

5. Liberty Mutual Insurance Company adjusted the workers compensation claims out of an office in Indianapolis, IN. On information and belief, UPS adjusted its claims out of its Livonia, Michigan office, such as through Greg Kelley or his successors..

6. Decisions regarding paying claims or terminating payment were made jointly by UPS and Liberty Mutual, or were made by Liberty Mutual after consulting with UPS, or were ratified by UPS after being made by Liberty. These allegations are based on information and belief, and are likely to have evidentiary

support after a reasonable opportunity for investigation and discovery. The persons with decision power at UPS and Liberty Mutual formed an "enterprise" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO). Karen Vaughn and or Greg Kelley were or may have been the persons at UPS who made decisions with the personnel at Liberty.

7. One or more of these persons committed extortion, attempted extortion, mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently terminating or denying benefits, or by fraudulently terminating benefits because a person refused to settle a claim for the amount offered by Liberty Mutual. This fraud was accomplished by use of the United States mails and by electronic communications in violation of 18 USC 1341 and 1343, and in violation of MCL 750.280. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery. In particular:

a. Liberty mailed via the Postal Service a Notice of Dispute announcing that it terminated the benefits of Sherri Yax for the reason "n o medical evidence for continued disability." This statement was fraudulent because defendant possessed multiple reports from multiple doctors stating plaintiff was disabled.

b. UPS approved and continued the termination of Sherri Yax's benefits after being told through counsel that medical reports stated she was disabled, and after being told through counsel that Liberty had denied benefits on the ground there was "no

> medical evidence for continued disability."

[rest of para. 7 and para 8 are omitted from Appendix]

COMPLAINT OF SHERRI YAX - FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

9. In late 2001 and in 2002, Liberty Mutual received reports from not one but three physicians, Drs. David Carr, Phillip Friedman and Dale Hoekstra, each saying that plaintiff remained disabled from her job because of lumbosacral symptoms and pathology. These reports indicated that plaintiff's disabling symptoms and or pathology were caused or at least partly caused (aggravated) by work Because plaintiff's disability was partly caused by work, it was fully compensable under the Michigan Workers Disability Compensation Act, MCL 418.101 et seq..

10. (A) In particular, on October 1, 2001, Dr. Phillip Friedman, board-certified neurosurgeon, reported to Liberty Mutual, and through it to UPS:

> Sherri appears to have symptoms of nerve root irritation related to Grade I spondylolisthesis and some disc protrusion. She has failed a trial of physical therapy.
>
> Because of the underlying spondylolisthesis, I believe even if she recovers she may be a risk for additional recurrences of pain in the future. I have stressed to her that the underlying pathology, ie, spondyloslisthesis, was not work-related, although work activities precipitated the symptoms.

(B) In particular, on Feb. 28, 2002, Dr. David Carr reported to Liberty Mutual:

Diagnostic studies have shown a developmental spondylolisthesis of a mild degree at the L5-S1 level. The MRI scan showed a disc protrusion toward the right side.

It is my opinion that the spondylolisthesis and the associated degenerative changes at that level are due to developmental factors with the impact of additional wear and tear based simply on the existing pathology and the passage of time. I do not identify any signs or Based on her complaints it is probable that the disc herniation at L5-S1 developed relative to those work activities.

At this time, I would recommend that she consider surgical intervention, if she refuses any additional attempts at injections in her low back and physical therapy has not helped. The surgery would include discectomy with nerve root decompression, which would relate to the work activities of August 2001. Any fusion done at that level, however, would address pre-existing developmental and non work-related pathology, which in my opinion did not increase or change relative to the work activities of August 2001.

It is anticipated that she could return to work, possibly with some restrictions within three to six months following the surgery if fusion is done, and within six to twelve weeks if only a discectomy is done.

On April 2, 2002, Dr. Carr wrote to defendants:

Based on her normal neurologic examination on 2/28/02, it would be my opinion that surgical intervention would address non-work related pathology relative to the spondylolisthesis (therefore a fusion would address non-work-related pathology) and any disc removal would address, by history, a

work-related condition.
In my opinion, Ms. Yax is able to work full time with a sit/stand/walk option, no repetitive bending or twisting, and no lifting or carrying over 10 pounds. These restrictions are applied, in part, for a work-related condition. These restrictions would be appropriate until she has her surgery.

11. UPS never provided plaintiff restricted work, and therefore plaintiff remained off work and defendants continued to pay workers disability compensation benefits.

12. On September 17, 2002, Liberty Mutual filed a Notice of Dispute with the Michigan Bureau of Workers Disability Compensation, stating "No medical evidence for continued disability." Pursuant to this Notice of Dispute, Liberty ceased paying workers compensation benefits.

13. At the time Liberty filed the notice of dispute, it possessed multiple medical reports stating plaintiff continued to be disabled. These reports were also in the possession of the workers compensation claims officials at UPS. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

COUNT I BY SHERRI YAX - RICO ALLEGATIONS

14. This cause of action arises under 18 USC 1961, 1962, 1964 and 1965. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery. Plaintiff incorporates pars. 4 through 13.

15. Defendants' workers compensation officials formed an "enterprise" within the meaning of the RICO Act, which engaged in a pattern of racketeering aimed at fraudulently denying workers compensation benefits to the UPS employees in this suit, or fraudulently terminating

those benefits.

16. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of UPS who are entitled to Michigan workers compensation benefits..

17. The predicate acts against plaintiff and her co-plaintiffs are described above in paragraph 7 -14.

18. Defendants' violation of RICO caused plaintiff to be wrongfully deprived of Michigan workers compensation benefits.

WHEREFORE Sherri Yax demands judgment against defendants for damages measured by the amount of benefits improperly withheld from her, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law.

COUNT II BY SHERRI YAX - WRONGFUL TERMINATION OF BENEFITS

19. Liberty mailed via the Postal Service a Notice of Dispute announcing that it terminated the benefits of Sherri Yax giving the reason "no medical evidence for continued disability." This statement was fraudulent because defendant possessed multiple reports from multiple doctors stating plaintiff was disabled. UPS approved and continued the termination of Sherri Yax's benefits after being told through counsel that it possessed specific reports stating she was disabled, and that its agent, Liberty had denied benefits on the ground that it had no medical evidence for continued disability. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and

discovery. Plaintiff incorporates pars. 4 through 13.

20. Plaintiff suffered emotional distress, pain, suffering, mental anguish and lack of medical care due to defendants' fraudulent termination of benefits.

21. Defendants' actions give rise to a cause of action recognized at common law by the Michigan courts in *Broaddus v Ferndale Fastener Division,* 84 Mich App 593, 269 NW2d 689 (1978), and *Atkinson v Farley,* 171 Mich App 784, 431 NW2d 95 (1988).

22. Defendants' actions have caused damages exceeding $75,000.

WHEREFORE Sherri Yax prays for judgment against defendants in an amount exceeding $75,000, plus interest, costs and attorney fees.

COUNT III BY SHERRI YAX - VIOLATION OF MCL 418.301(11)

23. MCL 418.301(11) provides that " a person shall not... in any manner discriminate against an employee because the employee.... instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee... of a right afforded by this act."

24. Defendants violated that law by fraudulently terminating plaintiff's benefits as hereinbefore described, causing the damages described in the preceding counts.

WHEREFORE Sherri Yax prays for judgment against defendants in an amount exceeding $75,000, plus interest, costs and attorney fees.

COMPLAINT OF BRIAN TRAYNOR FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

25. Brian Traynor was employed by UPS in a job

which required repetitive lifting of boxes weighing up to 75 pounds, and repetitive bending and twisting. He did this strenuous job without any significant back problem. Before his employment with UPS, he played football, wrestling and baseball in high school for three years without problem. Then, on August 20, 2002, when he was thirty years old, he fell and injured his low back while loading a truck at work for UPS.

26. Plaintiff' s supervisors at UPS, Mike O'Donnell and Jerry Welch, for two days would not allow plaintiff to go to a clinic, although his back was bruised, cut and swollen.

27. Plaintiff was sent by UPS to treatment at its industrial clinic, Concentra Medical Center, and began to receive weekly workers compensation checks from Liberty Mutual. He continued to receive these payments until the last check, dated March 12, 2003.

28. At Liberty Mutual' s request, plaintiff was examined on December 12, 2002, by neurosurgeon Dr. Paul Croissant. He diagnosed chronic first degree spondylolisthesis, and advised Liberty Mutual that plaintiff needed surgery, which he was willing to do.

29. Plaintiff was again examined at Liberty' s request, this time by Dr. William Higginbotham, on Feb. 3, 2003. Dr. Higginbotham wrote to Liberty that plaintiff suffered at work an aggravation of an underlying condition. Liberty knew from this report that plaintiff was disabled by a condition which was compensable under Michigan law, yet on March 13, 2003, Liberty cut off benefits, stating it was disputing benefits "based on 2/3/03 Dr. Higginbotham IME". Liberty's cut-off of benefits constituted fraudulent denial of benefits via mail and electronic communications. UPS officials were informed of the actions and decisions of Liberty, and approved them or let them stand. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have

evidentiary support after a reasonable opportunity for further investigation and discovery.

30. On March 18, 2003, in a phone conversation, Liberty's adjuster told plaintiff that he was denying plaintiff's workers compensation benefits, and then offered to settle the case.

31. Dr. Paul Croissant – chosen by Liberty Mutual in December, 2002, to examine plaintiff – wrote to Liberty Mutual on March 20, 3002, "There is no question in my mind that, although he had chronic first degree spondylolisthesis, his severe and chronic pain began with the fall described in my original note. I am just shocked that his own company would deny him like this. As quickly as we get the authorization, we plan to proceed with the surgery." Despite receipt of this letter, defendants continued to refuse to authorize surgery.

***

NOTICE OF DISPUTE

Michigan Department of Labor & Economic Growth
Workers' Compensation Agency
P O Box 30016, Lansing, MI 48909

1. Social Security No.	2. Date of Injury	3. Employee Name (Last, First, MI)		
4. Employee Address (Street No. and Name)		5. City	6. State	7. Zip Code
8. Employer Name				9. Federal ID No.
10. Employer Street Address		11. City	12. State	13. Zip Code
14. Carrier or Self-Insured Name			15. NAIC or Self-Insured No.	16. Zip Code
17. Service Company/TPA Name (if applicable)			18. Service Co./TPA ID No.	19. Zip Code
20. Claim or File No.		21. County of Injury		22. County Code (if known)

23. Reason for Dispute

A. _____ Injury not work related
B. _____ Medical treatment not related to injury
C. _____ Further investigation required (please specify below)
D. _____ Additional information required from employee (please specify below)
E. _____ Vocational rehabilitation dispute only (please specify below)
F. _____ Other (please specify below)

Making a false or fraudulent statement for the purpose of obtaining or denying benefits can result in criminal or civil prosecution, or both, and denial of benefits.

Authority: Workers' Disability Compensation Act, R408.33 (1)
Compliance: Mandatory
Penalty: Workers' Disability Compensation Act, 418.831; 418.801; R408.33

This is to certify that a copy of this form has been mailed or given to the injured employee.

24. Preparer's Name (Please print)	25. Signature	26. Telephone No.	27. Date

NOTICE TO EMPLOYEE

By filing this form, your employer or its workers' compensation insurance company has indicated to the Workers' Compensation Agency that it has a question or a dispute concerning the possible workers' compensation benefits to which you may be entitled. You may or may not agree with the position taken by the employer or insurance company.

If you feel that you are not receiving the benefits to which you are entitled, you should discuss this with your employer or a representative of its insurance company. If you have already done that or you are not satisfied with the discussion, you may file a formal application for mediation or hearing. You can obtain the appropriate forms or more information by contacting the Workers' Compensation Agency at our toll-free number of 1-888-396-5041 (if necessary, a TTY device is available at 517-322-5987). Additional information may also be found on our website at www.michigan.gov/wca.

The Department of Labor & Economic Growth will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, marital status, disability, or political beliefs. If you need assistance with reading, writing, hearing, etc., under the Americans with Disabilities Act, you may make your needs known to this agency.

WC-107 (Rev. 11/04)

STATUTES

FEDERAL

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,... for the purpose of executng such scheme or artifice or attempting so to do, places in any post office or authorized depository for maill matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,00,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1843

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be

fined under this title or imprisoned not more five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,00,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1961. Definitions

As used in this chapter

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471,472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511

(relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 23412346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave

traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of

racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations

authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the

conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding

sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall stop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

STATE STATUTES AND ADMINISTRATIVE RULE

MCL Sec. 301. (1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employees' dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.

MCL 418.315. (1) The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of an d in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this sate as legal, when they are needed. However, an employer is not required to reimburse or cause to be reimbursed charges for an optometric service unless that service was included in

the definition of practice of optometry under section 17401 of the public health code, 1978 PA 368, CL 333.17401, as of May 20 1992. An employer is not required to reimburse or cause to be reimbursed charges of services performed by a profession that was not licensed or registered by the laws of this state of or before January 1, 1998, but that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998. Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by the employee's spouse, brother, sister, child, parent, or any combination of these persons. After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician. The employer or the employer's carrier may file a petition objecting to the named physician selected by the employee and setting forth reason for the objection. If the employer or carrier can show cause why the employee should not continue treatment with the named physician of the employee's choice, after notice to all parties and a prompt hearing by a worker's compensation magistrate, the worker's compensation magistrate may order that the employee discontinue treatment with the named physician or pay for the treatment received from the physician from the date the order is mailed. The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation

magistrate. The work's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.

MCL 418.631. (1) If any insurer licensed to transact the business of workmen's compensation insurance within this state repeatedly or unreasonably fails to pay promptly claims for compensation for which it shall become liable or if it repeatedly fails to make reports to the director as provided in this act, the director may recommend to the commissioner of insurance that the license of the company be revoked, setting forth in detail the reasons for his recommendation. The commissioner shall thereupon furnish a copy of the report to the insurer and shall set a date for a hearing, at which both the insurer ad the director shall be afforded an opportunity to present evidence. If after the hearing the commissioner is satisfied that the insurer has failed to live up to al of its obligations under this act, he shall promptly revoke its license otherwise he shall dismiss the complaint.

Rule 408.33. (1) On or before the fourteenth day after the employer has notice or knowledge of an alleged injury or death, a carrier and the self-insurers' security found shall notify the bureau, on form 107, if the right of the injured or dependent to compensation is disputed. If compensation thereafter is paid, report it on form 701. A copy of form 107, notice of dispute, shall be mailed or given to the injured employee.

(2) The following subdivisions govern the administration and enforcement of the penalty provisions under section 801 of the act:

(a) Under section 801(a) of the act, compensation shall be paid promptly and directly to the person entitled to compensation. Weekly benefits become due and payable on the fourteenth day after the employer has notice of

knowledge of the disability or death. On that date, all compensation which has accrued shall be paid. If benefits are not paid within 30 days of becoming due and payable, then the carrier shall pay to the employee $50.00 per [illegible] for each day after 30 days that the benefits rema[illegible]npaid, not to exceed $1,500.00.

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(3)

No. 06-866

FILED

APR 20 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

SHERRI YAX, ET AL.,

Petitioners,

v.

UPS AND LIBERTY MUTUAL INSURANCE CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

Whether petitioners' civil RICO case alleging mail fraud based on the filing of notices of dispute with the state worker's compensation bureau was properly dismissed because petitioners failed to adequately plead fraud or that anyone relied upon any alleged fraud to their detriment, as required to support a claim under 18 U.S.C. § 1964(c) that they were entitled to treble damages for injury purportedly suffered "by reason of" the alleged mail fraud.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent UPS (also identified below as United Parcel Service, Inc.), an Ohio corporation, is a wholly-owned indirect subsidiary of United Parcel Service, Inc., a publicly-traded Delaware corporation. No publicly held company owns 10% or more of United Parcel Service, Inc., a publicly-traded Delaware corporation's stock.

Liberty Mutual Group owns 100% of the stock of respondent Liberty Mutual Insurance Company, which is a Massachusetts Stock Insurance Company. LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc. Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc. No publicly traded entity owns any stock of any of the above-named entities.

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INTRODUCTION

This case arises out of claims by petitioners for worker's compensation benefits that they attempted to transform into a civil RICO suit for treble damages after notices of dispute were filed that questioned the continuing nature of petitioners' work-related injuries and entitlement to benefits. Petitioners asserted that they suffered RICO injury based on the suspension of their benefits purportedly caused by alleged fraudulent statements in the notices of dispute.

Petitioners cannot meet the proximate cause requirement to maintain a civil RICO action under 18 U.S.C. § 1964(c) because, under state law, the filing of a notice of dispute allows suspension of benefits regardless of its contents and even if the notice is filed in bad faith. Therefore, any fraud in the notices of dispute (and respondents maintain that there was none) could not have been the proximate cause of the suspension of benefits; rather, it was the filing of the notices of dispute, regardless of any alleged fraud contained therein, that was the proximate cause. In addition, petitioners settled their worker's compensation claims without any decision by the state agency on the merits so that there could be no fraudulent causation at that juncture either. As in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), because petitioners have not satisfied the proximate cause requirement in civil RICO mail fraud cases, there is no occasion for the Court to address in this case any arguments regarding the reliance requirement. Moreover, whether there is a disagreement in the circuits regarding the issue of reliance under Section 1964(c) following the *Anza* decision would be better determined in a case where the court below was afforded an opportunity to reconsider its circuit precedent in light of that ruling by this Court. Indeed, in the instant case, petitioners failed to petition for *en banc* consideration even though the panel explicitly notified them of the court of appeals' inability to reconsider its own precedent absent such review.

STATEMENT

1. Statutory Framework

a. The Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, was enacted in 1970 to combat the influence of organized crime over the national economy. Under RICO, it is unlawful for a person to criminally influence or corrupt an organization. 18 U.S.C. § 1962(c). Specifically, Section 1962(c) makes it unlawful for a person employed or associated with an enterprise to conduct or participate in the conduct of the enterprise's affairs through a pattern of "racketeering activity." Racketeering activity is defined by RICO to include acts that can be charged under the federal mail fraud statute. *See* 18 U.S.C. § 1961(1)(B).

In addition to criminal penalties, 18 U.S.C. § 1963, RICO also allows civil remedies in certain circumstances, 18 U.S.C. § 1964. A person may bring a civil action for treble damages, costs, and attorneys' fees if the person was "injured in his business or property *by reason of* a violation of section 1962." 18 U.S.C. § 1964(c) (emphasis added).

Congress did not, however, intend that everyday fraud cases always morph into civil RICO actions. RICO does *not* "allow all actually injured plaintiffs to recover," as this Court recognized when it held that Section 1964's "by reason of" language requires that a civil RICO plaintiff prove not only "but for" causation, but also proximate cause. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-268 (1992).

b. The Michigan Worker's Disability Compensation Act, like typical worker's compensation statutes in other States, provides a remedy against an employer for an employee who is injured or disabled on the job. Mich. Comp. Laws § 418.131(1) (1969). The system provides substantial advantages to employees because Michigan law (first enacted in 1912 and substantially amended in 1969) requires an employer to compensate its employees

for *any* injury suffered in the course of employment, regardless of fault. As such, an employee is relieved of the burden of proving that the employer acted negligently. The law also requires exceptionally prompt payment to the injured employee. And it eliminates certain common law defenses that would otherwise be available to the employer, such as contributory or third-party negligence and assumption of risk. Michigan law also ensures that an employer demonstrate its capacity to pay the appropriate remuneration to its injured employees and requires an employer to purchase sufficient insurance from a commercial insurance carrier or to obtain self-insurance status, which requires approval from the Bureau of Workers' Disability Compensation. Mich. Comp. Laws §§ 418.601-418.657 (1969). At the same time, the worker's compensation system provides an advantage to employers because an employee's recovery is limited to lost wages, medical treatment, and rehabilitation services.

Once an employee establishes an injury compensable under Michigan's worker's compensation scheme, an employer is obligated to pay worker's compensation benefits within two weeks of notice and on a weekly basis thereafter. Mich. Comp. Laws § 418.801(1) (1969). But if, over time, the employee recovers from his work-related injury, the employer is no longer required to pay worker's compensation benefits. As such, an employer and its insurance carrier are entitled to an independent medical evaluation regarding the ongoing nature of the injury, in order to help determine whether the employee has a continued entitlement to worker's compensation benefits. Mich. Comp. Laws § 418.385 (1969) ("After the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or the carrier, he or she shall submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer or the carrier.").

The employer always possesses a statutory right to dispute the continued payment of benefits by filing a notice of dispute with the bureau of worker's compensation. Mich. Comp. Laws §§ 418.841(1), 418.847(1) (1969). The filing of a "notice of dispute" (a standardized form, *see* Pet. App. 52) relieves an employer or its insurance carrier from having to pay weekly worker's compensation benefits unless the dispute is resolved favorably to the employee. Mich. Comp. Laws § 418.801(2) (1969).

The filing of a notice of dispute is merely the initiation of a formal adjudication. It is not a determination as to the merits of an employee's entitlement to benefits. Under the statute, "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under th[e] act shall be determined by the bureau or a worker's compensation magistrate, as applicable." Mich. Comp. Laws § 418.841(1) (1969). Accordingly, Michigan law dictates that no statutory penalty can be assessed for the filing of a notice of dispute, even if the worker's compensation bureau subsequently determines "that [the employer] had disputed [the employee's] claim in bad faith, with no viable defense." *Couture v. Gen. Motors Corp.*, 335 N.W.2d 668, 670 (Mich. Ct. App. 1983); *see also Warner v. Collavino Bros.*, 347 N.W.2d 787, 789-790 (Mich. Ct. App. 1984) (rejecting any requirement that the filing of a dispute must be in "good faith" and holding "that an employer [who] disputed a claim in bad faith will not justify the assessing of a penalty against the employer").

Once a notice of dispute has been filed by an employer, the employee has an absolute right to a hearing before a magistrate. Mich. Comp. Laws § 418.222 (1969); *see also id.* §§ 418.841(1), 418.847(1) (1969). The employee also has a right to hire an attorney to represent him in the proceeding and to issue subpoenas. *See generally* Mich. Comp. Laws § 418.853; Mich. Admin. Code. r. 418.51 *et seq.*

(2007). The decision by the worker's compensation magistrate following the hearing is subject to appellate review by the appellate commission, and, thereafter, either aggrieved party can apply for review by the Michigan appellate courts. *See* Mich. Comp. Laws § 418.861 (1969).

2. Factual Background

a. Petitioners are former employees of respondent UPS who were awarded worker's compensation benefits based on their claims that they were injured during the course of their employment. Petitioner Yax received worker's compensation benefits based on her claim of a pre-existing back injury beginning in October 2001. Petitioner Traynor received worker's compensation benefits starting on August 20, 2002 based on a claim for a disabling back injury. Petitioner Dzagulones received worker's compensation benefits starting in November 1999 for nerve damage he claims he sustained when lifting boxes as a UPS driver. Pet. App. 11-12.

After an independent medical evaluation of each petitioner demonstrated that the condition of his or her injury no longer required payment of worker's compensation benefits, respondent Liberty Mutual Insurance Company (Liberty Mutual), the worker's compensation insurer for respondent UPS, initiated the administrative process to determine that continued benefits were not due. In each case, respondent Liberty Mutual filed a notice of dispute with the worker's compensation bureau and mailed copies of those notices to each of the petitioners respectively on September 17, 2002, Pet. App. 37 (petitioner Yax), March 13, 2003, Pet. App. 38 (petitioner Traynor), and April 22, 2003, Pet. App. 40 (petitioner Dzagulones). According to petitioners, these notices of dispute "misled the Agency as to the basis for defendants' cut-off of benefits." Pet. 22. The notices of dispute form the predicate for petitioners' civil RICO action because petitioners contend that the statement "No medical evidence for continued disability"

in each notice "was fraudulent." Pet. App. 37 (petitioner Yax); *see also* Pet. App. 38 (alleging that the notice of dispute with respect to petitioner Traynor was not true); 2d Am. Compl. ¶ 29 (alleging that notice of dispute with respect to petitioner Dzagulones was not true); Pet. App. 18 ("Plaintiffs in fact claim Defendants provided false and [mis]leading information to the Worker's Compensation board.").

b. Petitioners then filed the instant civil RICO action against respondents on May 29, 2003 in the United States District Court for the Eastern District of Michigan. Petitioners asserted that respondents' exercise of their state law right to an adjudication of the challenge to petitioners' claim for continued worker's compensation benefits constituted a "pattern of racketeering activity" in violation of 18 U.S.C. § 1962(c). Pet. 7. Petitioners asserted that they were injured by respondents' alleged fraud "because it deprived [them] of workers compensation benefits and because it caused [them] the expense of paying attorney fees and [their] own mileage to and from medical care." 2d Am. Compl. ¶¶ 12 (petitioner Yax), 22 (petitioner Traynor), 30 (petitioner Dzagulones). They sought "damages measured by the amount of benefits improperly withheld" "plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law." *Id.* ¶¶ 18, 27, 36.

Respondents moved to dismiss petitioners' complaint on two grounds relevant here. Respondents asserted that petitioners' RICO claims were barred by the primary jurisdiction doctrine which requires that the matter be determined by the Michigan Worker's Compensation Bureau. Respondents also argued that petitioners failed to plead proximate causation as required under 18 U.S.C. § 1964(c) to demonstrate that any alleged civil RICO mail fraud injury was "by reason of" the alleged fraud.

The district court agreed that the question whether the employees' physical injuries "arose out of and in the course of [their] employment 'is a question to be resolved

in the first instance exclusively by the Bureau.'" Dist. Ct. Order at 7 (Mar. 31, 2004) (quoting *Sewell v. Bathey Mfg. Co.*, 303 N.W.2d 876 (Mich. 1981)). The court explained "that the Worker's Compensation Bureau is most qualified to determine whether [respondents] acted properly when they terminated [petitioner's] workers' compensation benefits" and the case "should be stayed" pending a resolution of those proceedings. *Ibid.*

But the district court also found "that it would be futile to stay this case if dismissal [was] proper for other reasons." *Id.* at 8. The court concluded that dismissal was proper for the other reason that petitioners' allegations failed to state a cause of action because civil RICO requires a plaintiff to plead that the alleged fraud was relied upon to meet the requirement of Section 1964(c) that a plaintiff be injured "by reason of" the alleged racketeering conduct. *Id.* at 17-19. Accordingly, the court dismissed petitioners' complaint but granted them limited leave to amend their civil RICO cause of action. *Id.* at 25.[1]

Petitioners amended their complaint on April 23, 2004, Pet. App. 42-51, and respondents moved, on May 4, 2004, to dismiss petitioners' amended civil RICO cause of action, again, for among other issues, the failure to plead the requisite causation. In the alternative, respondents asked the court to stay the case pending resolution of petitioners' worker's compensations claims before the state worker's compensation bureau.

While respondents' motion to dismiss was pending against them, petitioners each entered into a settlement agreement with respondents for their worker's compensation claims on May 28, 2004 (petitioner Traynor), August 5, 2004 (petitioner Dzagulones), and March 5, 2005 (petitioner Yax). The settlements compensated petitioners

[1] Petitioners erroneously filed a notice of appeal from the non-final order granting them leave to amend their complaint. The Sixth Circuit required them to dismiss their appeal on May 14, 2004.

for alleged lost worker's compensation benefits (also alleged as civil RICO mail fraud injuries in their lawsuit) and, as part of the settlement, petitioners accepted and approved the various relevant medical reports, including reports they previously indicated were fraudulent. But petitioners did not release any rights to proceed under RICO.[2]

The district court ultimately dismissed petitioners' second amended complaint with prejudice on May 27, 2005. Pet. App. 9-19. The court ruled that the filing of a notice of dispute regarding petitioners' claims under the Michigan worker's compensation system could not amount to a civil RICO mail fraud violation because none of the alleged fraud "was intended to mislead Plaintiffs," Pet. App. 16, and petitioners could not demonstrate that they "relied on those misrepresentations or omissions to their detriment," *id.* at 14. The court also explained that petitioners could "show no alleged false statements." Pet. App. 15. The court noted that the notice of dispute was not false because respondents had terminated the benefits "and claimed it was based on no medical evidence of continued disability." *Id.* at 16. Moreover, the district court explained that the reason that independent medical evaluations "are taken and reports sent to the Worker's Compensation Board is to allow the Board to make a decision about disability payments." *Ibid.*

Finally, the district court ruled (for the second time) that petitioners had not satisfied Rule 9(b) of the Federal Rules of Civil Procedure. Pet. App. 17-18, *see also* Pet. App. 26-28 (district court's March 31, 2004 dismissal of first amended complaint). The district court found that petitioners failed to plead in their complaint any particularized fraudulent communications, which was

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[2] Petitioners also attempted to file, without leave of the district court, a Third Amended Complaint (after filing a "Revised" Second Amended Complaint) while respondents' motion to dismiss was pending. The court denied leave to file the Third Amended Complaint.

inexcusable because they had "already gone through the worker's compensation process" in settling their claims. Pet. App. 18.

c. The court of appeals affirmed. Pet. App. 1-8. The court explained that "a plaintiff 'cannot maintain a civil RICO claim . . . absent evidence that the defendants made misrepresentations or omissions of material facts to [the plaintiff] and evidence that [the plaintiff] relied on those misrepresentations or omissions to its detriment." Pet. App. 4 (quoting *Cent. Distribs. of Beer, Inc. v. Conn.*, 5 F.3d 181, 184 (6th Cir. 1993)) (alterations in original). Petitioners' primary argument was that the court of appeals should modify its longstanding precedent on reliance in civil RICO mail fraud actions, established in *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984). Pet. App. 4. The panel made clear, however, that it could not reverse this precedent and that such a modification could occur only if the Sixth Circuit "sitting en banc overrules the prior decision." *Ibid.* (quoting *United States v. Washington*, 127 F.3d 510, 517 (6th Cir. 1997)). With respect to petitioners' claim that their civil RICO cause of action adequately pleaded reliance, the court of appeals explained that the "complaint does not allege what misrepresentation (or omissions) of material fact [UPS] made to the plaintiffs that they reasonably relied upon to their detriment." Pet. App. 5-6 (quoting *Bender*, 749 F.2d at 1216) (alterations in original). The court of appeals held that "[w]hat Plaintiffs characterize as reliance upon the statements contained in the notices [*i.e.*,] payments of various expenses and deprivation of benefits are, in reality, nothing more than consequences flowing from Defendants' decision to contest Plaintiffs workers' compensation benefits in each case." *Id.* at 6 (alterations omitted).

Notwithstanding the court's express admonition to petitioners that only the *en banc* court could provide them with the relief they sought, petitioners did not seek rehearing *en banc*.

REASONS THE PETITION SHOULD BE DENIED

The unpublished decision of the Sixth Circuit is correct and is based on longstanding circuit precedent. Petitioners now request review by this Court of a question of reliance in civil RICO mail fraud actions. Petitioners make this request even though they did not ask the Sixth Circuit *en banc* to reconsider its own precedent or to consider the intervening proximate cause precedent of this Court in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), or even *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which also post-dates the circuit precedent on which the Sixth Circuit relied, *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984).

Review by this Court is not warranted here because petitioners cannot, as a matter of law, establish the proximate cause necessary to support a civil RICO mail fraud cause of action under 18 U.S.C. § 1964(c). *See Anza*, 126 S. Ct. at 1998 (the absence of proximate cause gives this Court "no occasion" to address the issue of reliance). Any purported fraud (and respondents maintain that there was none) in the notices of dispute filed by respondent Liberty Mutual with the state worker's compensation bureau did not lead directly to any injury to petitioners. The filing of a notice of dispute, regardless of any fraud or bad faith, is grounds for suspension of benefit payments as a matter of state law until any determination by the state agency that continued benefits are due the employee. State law provides a full and fair hearing before a magistrate that can award an aggrieved employee back benefits with interest. *See* pages 2-5 *supra*. And state law provides the actual victim of any such fraudulently filed notice of dispute – *i.e.*, the state worker's compensation bureau – with adequate means to vindicate its rights. Here, as in *Anza*, there is too tenuous a relation between the suspension of benefits asserted as petitioners' civil RICO mail fraud injury and the purportedly fraudulent conduct, for the case to merit this Court's consideration. *Anza*, 126 S. Ct. at 1999. Moreover, petitioners settled

their worker's compensation claims and the state agency never made a decision on the merits that could possibly have been influenced by any fraudulent statements, thus making this case an especially inappropriate vehicle to address reliance.

Petitioners' arguments regarding the views of the various courts of appeals on the issue of reliance in RICO cases are inapposite and do not demonstrate that this case would have yielded a different result in another circuit. The petition also fails to address adequately the pertinent appellate decisions and their relevance to the instant dispute, and is rife with basic misreadings of circuit court precedent.

The court of appeals correctly held that petitioners' civil RICO mail fraud cause of action must fail because petitioners do not plead, and cannot establish, that they relied on any purported fraud to their detriment. As the courts below correctly recognized, allowing petitioners' civil RICO action to proceed would create a circumstance where filing a notice of dispute with a *state* worker's compensation bureau would transform any ordinary state worker's compensation dispute into a *federal* civil RICO mail fraud suit. Every employee whose right to worker's compensation benefits is challenged by an employer would have an incentive to threaten a civil RICO mail fraud suit whenever an employer or its insurer uses the mails. Not only would this cause an unprecedented expansion of civil RICO, it would significantly undermine state worker's compensation systems across the nation, a result that was not intended by Congress when it enacted RICO. The ruling below should not be disturbed through exercise of this Court's discretionary review.

I. PETITIONERS' CASE IS A POOR VEHICLE IN WHICH TO ADDRESS THE ISSUE OF CIVIL RICO RELIANCE BECAUSE THERE IS NO PROXIMATE CAUSATION AND NO DIFFERENT RESULT WOULD HAVE BEEN REACHED IN ANY OTHER CIRCUIT

Petitioners' vague petition obscures the true nature of their civil RICO mail fraud action. Petitioners assert that the initiation of state agency proceedings by the filing of a notice of dispute somehow constitutes racketeering and caused them RICO injury. The unpublished opinions of the court of appeals and the district court correctly recognize, however, that respondent Liberty Mutual did no more than file notices of dispute to seek, as provided for by state law, full and fair state law adjudication of petitioners' worker's compensation claims. Pet. App. 6; 15-16. No court has ever sustained such a novel expansion of civil RICO, and prior attempts to create such a cottage industry of civil RICO mail fraud suits out of the mere invocation of state law adjudicative procedures have been unequivocally rebuffed. *See, e.g.*, *Moon v. Harrison Piping Supply*, 465 F.3d 719 (6th Cir. 2006) (rejecting civil RICO mail fraud claim based upon near-identical complaint against different employer), *cert. denied*, __ S. Ct. __ (2007). This Court's sanction of such a complaint would open the floodgates to concurrent and collateral federal litigation over the accuracy of state administrative and judicial filings and proceedings.

The unique and unprecedented expansion of civil RICO that petitioners seek makes this case a singularly poor vehicle to address whether reliance is necessary in a civil RICO suit alleging federal mail fraud. First, the issue of proximate cause in this case – an issue intertwined with reliance – is eclipsed by state law that allows for suspension of worker's compensation benefit payments regardless of whether a fraudulent notice of dispute is filed. Second, petitioners are wrong that their complaint would survive a Rule 12 motion to dismiss in other circuits. Petitioners misread the cases they cite and, in

any event, there would be no different outcome under any other reliance test on the facts of this case. The absence of any determination of the merits of petitioners' worker's compensation claims by the state worker's compensation bureau means that the bureau could not have possibly relied on any purportedly fraudulent submission by respondents.

A. There Is No Proximate Cause To Support The Civil RICO Claim In This Case

Proximate cause is a required element in a civil RICO action. A plaintiff must show that a defendant's violation "not only was a 'but for' cause of his injury, but was the proximate cause as well." *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1996 (2006) (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992)). To satisfy this requirement, there must be "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268.

As in *Anza*, the clear absence of proximate cause in this case makes it a poor vehicle to allow consideration of the scope of reliance that is required generally in a civil RICO case alleging mail fraud. 126 S. Ct. at 1998. In the context of fraud, reliance is best understood as a necessary, but not always sufficient, means to demonstrate causation. *See Restatement (Second) of Torts* § 546 (1977). Thus, it would be anomalous to address reliance in a case where proximate cause is clearly lacking because, as the courts of appeals have overwhelmingly recognized, reliance is a well-accepted aspect of proximate cause in a civil RICO suit. *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360-1361 (11th Cir. 2002); *Summit Props. Inc. v. Hoeschst Celanese Corp.*, 214 F.3d 556, 560-562 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001); *VanDenBroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994).

Petitioners' complaint is fundamentally defective in this regard. As this Court has made clear, "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza*, 126 S. Ct. at 1998. In the instant case, the alleged violation is respondent Liberty Mutual's inclusion of purportedly fraudulent statements in the notices of dispute that were filed to seek adjudication by the state agency of whether petitioners suffered a continuing disability that entitled them to worker's compensation benefits. Pet. App. 37 (alleging that statement in the notice of dispute with respect to petitioner Yax "was fraudulent"); Pet. App. 38 (alleging that the notice of dispute with respect to petitioner Traynor was not true); 2d Am. Compl. ¶ 29 (alleging that notice of dispute with respect to petitioner Dzagulones was not true); Pet. App. 18 ("Plaintiffs in fact claim Defendants provided false and [mis]leading information to the" bureau). Petitioners claim that they suffered RICO injury caused by allegedly fraudulent statements because they stopped receiving worker's compensation benefits upon the filing of the notices of dispute. Pet. App. 2, 6.[3]

But it is clear that, as a matter of state law, the inclusion of any fraudulent statements in the notices could not have "led directly" to the suspension of the worker's compensation benefit payments to petitioners. That is so because, under Michigan law, the filing of *any* notice of dispute allows the suspension of worker's compensation benefit payments, *see* Mich. Comp. Laws § 418.801(2)

[3] Because the district court correctly held that petitioners' complaint also fails to satisfy the requirements of Rule 9(b) to plead fraud with particularity, Pet. App. 17, 26-28 (indeed, the complaint provides virtually no road map as to what purportedly fraudulent statements were made) that provides another basis for affirmance by this Court and would make it difficult for this Court to address issues of proximate cause and reliance in this case.

(1969), and that is true even if the filing of a notice of dispute was in bad faith. *Warner v. Collavino Brothers*, 347 N.W.2d 787, 789-790 (Mich. Ct. App. 1984); *Couture v. Gen. Motors Corp.*, 335 N.W.2d 668, 670 (Mich. Ct. App. 1983). Thus, state law dictates that the outcome would have been the same in this case, regardless of the contents of the notices of dispute.

That is not to say that the issue of reliance could never be addressed in some potentially analogous situations. For example, proximate cause might exist if a state agency *incorrectly* rendered a decision on the merits *based solely upon* fraudulent statements. Under such circumstances (and if those hypothetical plaintiffs had made particular allegations to that effect), the alleged fraud may have "led directly" enough to the alleged injury to allow a court to decide whether reliance was required, *see Anza*, 126 S. Ct. at 1998; *Holmes*, 503 U.S. at 268-269.[4] But such a case would present this Court with a better vehicle to address whether reliance is required in a civil RICO action alleging violations of mail fraud. In such a

[4] In the instant case, petitioners did everything in their power to not allow the state administrative proceedings to run their course to an adjudication so this case does not present such a fact pattern. For example, respondent Liberty Mutual filed a dispute with the state worker's compensation bureau as to petitioner Traynor's worker's compensation benefits on March 13, 2003, but Traynor and the other petitioners filed the complaint in the instant case in federal court on May 29, 2003, providing the worker's compensation bureau no opportunity to adjudicate the claim. The district court recognized this attempt to subvert state law procedures and dismissed and stayed the civil RICO action on March 31, 2004. *See* Dist. Ct. Order (Mar. 31, 2004). In response, petitioners filed an amended complaint on April 24, 2003 and, a few months later, settled their worker's compensation cases and "accepted and approved" the medical reports, but left their civil RICO action for treble damages to be adjudicated. Of course, as discussed in note 5 *infra*, even if petitioners had pled such a scenario, their complaint would still be defective as a matter of law on other grounds.

case, however, other significant defenses may exist.[5] The absence of such circumstances in the instant case should preclude this Court's review.

B. Plaintiffs Misread The Court Of Appeals Cases They Cite, And They Would Not Benefit From A Different Reliance Requirement

Even if this Court were to overlook the absence of proximate cause in this case, petitioners fail to explain how any disagreement amongst the circuits is relevant to their civil RICO mail fraud cause of action. In alleging a broad conflict of authorities in the courts of appeals, petitioners mischaracterize the cases they cite and fail to demonstrate that their complaint would survive under the standards articulated in *any* of the cases upon which they rely. As discussed below, there is no circuit authority that unequivocally eliminates all requirement that a plaintiff plead reliance, and petitioners' inability to do so in the instant case is fatal to their cause of action. As such, even if a split involving the scope of the reliance requirement

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[5] In the context of a state adjudication, numerous hurdles would have to be overcome by a civil RICO plaintiff. Primary jurisdiction and other abstention doctrines would likely prove fatal to such a complaint. Moreover, principles of federalism might be offended if federal courts were to investigate the *reasons* why a state court or its administrative counterpart reached the ruling it did. In this case, for example, the district court correctly held that petitioners' civil RICO cause of action was reverse preempted by the McCarran Ferguson Act, 15 U.S.C. § 1012, *see* Dist. Ct. Order at 8-11 (Mar. 31, 2004), and that the complaint was not pled with particularity as required by Fed. R. Civ. P. 9(b), *see* Pet. App. 17-18, both of which further demonstrate the futility of petitioners' action. The court of appeals found it unnecessary to rely upon these alternative grounds for affirmance, Pet. App. 6, but these alternative grounds supporting the judgment below undermine the value of this case as a means for addressing questions of reliance and would support affirmance by this Court in any event.

would be worthy of this Court's plenary review, it is plainly inapposite to this dispute.

1. Petitioners err in claiming (Pet. 19-20) that the Third, Eighth, and Ninth Circuits do not require a civil RICO plaintiff to plead reliance to support a claim of mail fraud. No court of appeals has adopted such a rule.

The Eighth Circuit, like the Sixth Circuit, requires a civil RICO plaintiff alleging mail fraud to plead reliance as part of proximate cause. That court has expressly held: "In order to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts." *Appletree Square I*, 29 F.3d at 1286. As such, the Eighth Circuit is in accord with the ruling below. Petitioner's citation (Pet. 19) to the Eighth Circuit's decision in *Abels v. Farmers Commodities Corp.*, 259 F.3d 910 (8th Cir. 2001), is irrelevant to the issue of reliance, as petitioners' out-of-context and selective quotes of that opinion address only whether the plaintiffs had "adequately pleaded a 'pattern of racketeering activity.'" *Id.* at 918 (quoting 18 U.S.C. § 1962(c)).[6]

Neither the Ninth Circuit nor the Third Circuit have ruled on whether reliance is required. *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.* 806 F.2d 1393 (9th Cir. 1986), does not support petitioners' alleged split. Pet. 19. Even the most cursory review of that decision demonstrates that the Ninth Circuit was describing only the statutory requirements for the predicate acts of mail and wire fraud, *Schreiber Distributing*, 806 F.2d at 1399-1400, without addressing the civil RICO "by reason of" requirement in Section

[6] The quoted statements from *Abels* referred to whether the mailing needed to communicate the fraud or merely "assist[] in carrying out the fraud"; the court did not, and could not, obviate the requirement that there be fraud. *Abels*, 259 F.3d at 918 (quoting *Atlas Pile Driving v. DiCon Fin. Co.*, 886 F.2d 986, 992 (8th Cir. 1989)).

1964(c). Indeed, the question of reliance is *expressly* unresolved in the Ninth Circuit. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666 (9th Cir. 2004) ("Because it is neither necessary nor prudent to reach the issue of whether reliance is the only way plaintiffs can establish causation in a civil RICO claim predicated on mail fraud, we decline to do so.").

Petitioners again miss the mark by relying upon *Tabas v. Tabas*, 47 F.3d 1280 (3d Cir.) (en banc), *cert. denied*, 515 U.S. 1118 (1995). Pet. 19-20. That decision also did not resolve the question of reliance. Rather, *Tabas*, just like petitioners' mistaken citation to the Eighth Circuit's ruling in *Abels*, focused on the question of whether the defendant had engaged in a pattern of racketeering activity. With respect to *that* issue, the Third Circuit explained that "the elements of the federal offense of mail fraud" do not require a showing that "the mailings involved" *themselves* contained misrepresentations or were "relied upon by the victim of the fraud," as opposed to a different aspect of the racketeering scheme. *Tabas*, 47 F.3d at 1294 and n.18. The Third Circuit did not decide, and has not decided, the question presented by petitioners as to whether reliance is an element of proximate cause under Section 1964(c).

In any event, the question whether precedent in the various circuits fails to require reliance in a civil RICO action alleging mail fraud is of diminishing importance after this Court's decision in *Anza*, because any such precedent would plainly have to be reconsidered. If the primary proximate cause consideration is whether a defendant's fraud "led directly" to the plaintiff's injury, there must be some reliance on the fraud for the defendant to be responsible for the harm. *Anza*, 126 S. Ct. at 1998. Indeed, petitioners can identify *no* circumstance under

Anza in which proximate cause could exist in the absence of reliance on the alleged misrepresentation.[7]

2. Having gone 0-3 in their attempt to prove that three circuits do not require reliance, petitioners fare no better in their argument that their case would survive if it were filed in the First, Fourth, or Fifth Circuits. Petitioners correctly concede that those courts of appeals require reliance albeit in different degrees,[8] Pet. 20-24, but then wrongly suggest that their complaint demonstrates that a third party (the worker's compensation bureau) relied upon the purportedly fraudulent notices of dispute to the direct detriment of petitioners, which they contend would satisfy the reliance requirement of those circuits.

First, petitioners' assertion that the statements in the notices of dispute "misled the Agency as to the basis for defendants' cut-off of benefits" is wrong. Pet. 22. In no manner did the worker's compensation bureau "rely" upon allegedly fraudulent statements by respondents to "cut-off" petitioners' benefits. As discussed above, as a matter of Michigan law, the filing of a notice of dispute

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[7] As of April 18, 2007, only four published decisions of the courts of appeals have cited *Anza*, and none have held that reliance is not required in a civil RICO cause of action. *See, e.g.*, *Phoenix Bond & Indem. Co. v. Bridge*, 477 F.3d 928 (7th Cir. 2007), *petition for rehearing pending*; *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007); *James Cape & Sons Co. v. PCC Construction Co.*, 453 F.3d 396 (7th Cir. 2006); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273 (2d Cir. 2006). This Court would be better served by allowing its decision in *Anza* to percolate in the courts of appeals before addressing an issue so closely related to the Court's decision last Term.

[8] The Ninth Circuit incorrectly asserts that the First Circuit in *Systems Management, Inc. v. Loiselle*, 303 F.3d 100 (1st Cir. 2002), requires no reliance. *Poulos*, 379 F.3d at 666 n.3. *Systems Management* is better read as a third-party reliance decision because it involved a circumstance where the plaintiff did not rely upon the misrepresentation, but a third party plainly did, to the direct detriment of the plaintiff. Indeed, that is how petitioners read the First Circuit ruling. Pet. 21.

allows suspension of benefit payments irrespective of its content or whether it is filed in good or bad faith, *see* Mich. Comp. Laws § 418.801(2) (1969); *Couture*, 335 N.W.2d at 670; *Warner*, 347 N.W.2d at 789-790, until there is a formal adjudication. Thus, it does not matter whether a notice of dispute states "improper reasons for the cut-offs of benefits," Pet. 23, because Michigan law allows suspension of benefits without regard to the contents of the notice of dispute. Indeed, the court of appeals correctly recognized that "[w]hat Plaintiffs characterize as reliance upon statements contained in the notices * * * are, in reality, nothing more than consequence flowing from Defendants' decision to contest Plaintiffs' workers' compensation benefits in each case." Pet. App. 6. Similarly, any alleged fraud in medical reports, Pet. App. 39-41, could not have been relied upon by a worker's compensation magistrate or bureau because *neither made a decision* about the merits of the challenge to the worker's compensation payments to petitioners. Moreover, any argument that an alleged RICO injury could be premised on any such medical reports would be even more tangential and lack proximate cause. The district court correctly recognized that "the *only* reason [independent medical evaluations] are taken and reports sent to the Worker's Compensation Board is to allow the Board *to make a decision* about disability payments." Pet. App. 16 (emphasis added).

Second, the nature of the worker's compensation proceeding, and the absence of any adjudication, makes the issue of reliance (particularly as an aspect of proximate cause) difficult to discern. As in *Anza*, the "attenuated connection" between the alleged injury in this case and the conduct alleged can be demonstrated by "the speculative nature of the proceedings that would follow if [petitioners] were permitted to maintain [their] claim[s]." *Anza*, 126 S. Ct. at 1997-1998. Were a case such as this to proceed to trial, a court would need to determine whether the statements in the notices of dispute were false, whether the worker's compensation bureau relied upon those statements, and whether petitioners would have

received their benefits absent such reliance. This type of speculation has no place in civil RICO actions, and this Court's precedents recognize that "these types of intricate, uncertain inquiries" must be prevented "from overrunning RICO litigation." *Id.* at 1998.

Third, if a disagreement among the circuits develops post-*Anza*, this Court will have better opportunities to address the degree of reliance required in civil RICO mail fraud cases. For example, following *Anza*, the Seventh Circuit in *Phoenix Bond & Indemnity Co. v. Bridge*, 477 F.3d 928 (7th Cir. 2007), *petition for rehearing en banc pending*, recently addressed a fact pattern that seems to present circumstances where third-party reliance might apply. In that case, the alleged fraud occurred when the defendants filed a false or misleading affidavit stating that they had submitted only one bid in a county tax lien auction (an affidavit was required because multiple bids disqualified a bidder). Allegedly, the county relied upon the false affidavit and was defrauded into permitting the defendant to participate in the auction, to the detriment of other bidders. Plaintiffs, the competing bidders, alleged that they were injured by this fraud, and brought a civil RICO claim. The Seventh Circuit permitted the action to go forward because the plaintiffs were direct victims of the fraud, even though another party actually received the false statements. *Id.* at 932. *Phoenix Bond & Indemnity Co.* is currently pending on petition for rehearing *en banc* (a step petitioners in the instant case did not take). The parties there are represented by experienced counsel and that case would provide a far better fact pattern for this Court to address the necessity of a reliance requirement.

II. The Sixth Circuit Correctly Required That Petitioners Plead Detrimental Reliance And There Is No Basis To Reverse The Decision Below

Petitioners err in claiming this Court held in *Holmes* that reliance is not required in a civil RICO fraud action.

Pet. 15-18. Indeed, petitioners' argument in this regard further highlights the basic deficiency of their submission and the inappropriateness of review in the instant case.[9] This Court has never held that reliance is not required in a civil RICO suit that alleges violations of federal mail or wire fraud. Rather, this Court's well-established precedent demonstrates that reliance must be a necessary component of proximate cause in a civil RICO cause of action like this one.

The courts of appeals consistently have held that reliance is an aspect of proximate cause. *Sikes*, 281 F.3d at 1360; *Summit Props. Inc.*, 214 F.3d at 560-562; *VanDenBroeck*, 210 F.3d at 701; *Chisolm*, 95 F.3d at 337; *Appletree Square I,* 29 F.3d at 1286. And, as discussed above, proximate cause is required by Section 1964(c)'s "by reason of" provision in civil RICO actions predicated on mail and wire fraud. *Holmes*, 503 U.S. at 278.

Petitioners blithely overlook this Court's explicit command in *Holmes*. Rather, relying on *Neder v. United States*, 527 U.S. 1 (1999), petitioners argue that a *civil*

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[9] Petitioners argue that this Court in *Holmes* cited *Taffet v. The Southern Co.*, 930 F.2d 847 (11th Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992), and *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990), for the proposition that a civil RICO plaintiff who failed to prove common law fraud can nonetheless establish proximate cause. Pet. 18. This Court, at most, indicated only that proximate cause "might" be satisfied in the circumstances of those cases. *Holmes*, 503 U.S. at 274 n.19. Reliance was required and established in both cases. The court of appeals in *Long Island Lighting* held that it was necessary for the plaintiffs to demonstrate that the misrepresentations "were relied upon." *Long Island Lighting*, 907 F.2d at 1311. Reliance was present in *Taffet*, because the alleged wrongdoing in that case was that the defendant utility companies fraudulently submitted false statements to the IRS, which were relied upon by the IRS to reduce or defer the utilities' tax burden. The statements had the collateral effect of injuring plaintiffs by permitting the defendants to charge higher rates. *Taffet*, 930 F.2d at 850. Of course, in *Anza*, this Court held that precise fact pattern to be devoid of proximate cause. *Anza*, 126 S. Ct. at 1994-1995.

RICO action requires only allegations of an "indictable" act under the mail fraud statute, not "reliance" and "damages" which, according to petitioners, "plainly have no place in the federal fraud statutes." Pet. 13 (citing *Neder*, 527 U.S. at 24). Petitioners argue that the decision below conflicts with this Court's precedents requiring only a "'scheme to defraud[]' rather than the completed fraud," *Neder*, 527 U.S. at 25, thus obviating any reliance requirement (as well as any injury in fact). Pet. 14.

Petitioners' argument is fatally flawed because it conflates the standards required in criminal RICO cases with the standards required in civil RICO cases, and would lead to nonsensical results. The government, in a *criminal* prosecution for mail and wire fraud, is relieved of such proof because it does not need to satisfy the *civil* standard of Section 1964(c). *Cf. United States v. Rowe*, 56 F.2d 747, 749 (2d Cir.) (L. Hand, J.) ("Civilly of course the action would fail without proof of damage, but that has no application to criminal liability."), *cert. denied*, 286 U.S. 554 (1932). Section 1964(c) plainly requires more in civil actions for treble damages, *viz.*, an injury "by reason of" the enterprise's racketeering activity. *Anza*, 126 S. Ct. at 1995-1998; *Holmes*, 503 U.S. at 266-268.

This Court has held that the elements of federal mail and wire fraud are derived from common law. *Holmes*, 503 U.S. at 267-268. Under the common law, civil fraud requires that a plaintiff "must have been misled to his prejudice or injury." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 203, at 227 (13th ed. 1886). The unpublished decision below is consistent with that requirement because the court of appeals held that a civil RICO plaintiff alleging violations of mail fraud "cannot maintain a civil RICO claim absent evidence that the defendants made misrepresentations or omissions of material facts to the plaintiff and evidence that the